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AILA ETHICS Compendium

Modern Legal Ethics for
Immigration Lawyers

AILA Doc. No. 13100890. (Posted 10/21/22)

American Immigration Lawyers Association

AILA Ethics Compendium

Modern Legal Ethics for Immigration Lawyers

A publication of the AILA Ethics Committee and the AILA Practice & Professionalism Center

A member service of the American Immigration Lawyers Association

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FOREWORD

A lawyer new to immigration practice quickly learns that it involves far more than completing forms for submission to the government or shepherding a foreign national through an administrative hearing. Immigration practice requires a high level of knowledge to provide responsible representation in a constantly changing world of laws, regulations, court decisions, administrative cases, agency memos and directives.

New immigration lawyers may assume that if they are honest and fair with their clients, they don't have to worry about specific ethical rules. They are wrong. Immigration lawyers may be licensed in one jurisdiction, but they are practicing federal immigration law, and their professional conduct is governed by ethics rules, federal regulations, and federal law. The ABA Model Rules of Professional Conduct, which have been adopted, either verbatim or with significant variations into most states' Rules of Professional Conduct, provides detailed but sometimes confusing standards of conduct for immigration lawyers. Add to those the Federal Rules of Practitioner Conduct promulgated by the Executive Office for Immigration Review (EOIR), the criminal proscriptions in the Immigration and Nationality Act and other federal statutes, and the special challenges of dual representation, ethical immigration practice gets even more complex.

An immigration lawyer also deals with a special category of clients—some who are desperate to obtain legal status through any means possible, raising the risks for the lawyer. The need for an immigration lawyer to be competent is obvious, as is the obligation to develop a lawyer-client relationship based on mutual trust. However, even the most competent and dedicated immigration lawyer may be unaware of the specific ethical obligations that govern his practice.

Against this backdrop, the AILA Ethics Committee (Committee) has established the AILA Ethics Compendium, a modern, comprehensive resource to help members understand and resolve the often unique ethical dilemmas that arise in immigration practice. The AILA Ethics Compendium is a multi-year project of the AILA Ethics Committee to separately analyze selected state and federal professional conduct rules, court opinions, legal ethics opinions, and other authority to guide immigration lawyers.

The Compendium does not set a standard or create new ones. The goal of this evolving work is to provide relevant legal ethics information and guidance in a single location for members to use when deciding their course of conduct when confronted with an ethical dilemma.

Members are encouraged to read each rule thoroughly when using the Compendium in their ethics research. Although we strive to keep this material updated, the Compendium is not intended as a substitute for consulting your individual state bar Rules of Professional Conduct and applicable legal ethics opinions, and the EOIR/DHS Federal Rules of Practitioner Conduct before determining your course of conduct.

Our thanks to the AILA Board of Governors for providing the funding for this important initiative. Thanks to our Board of Advisors for their guidance, as well as to all AILA members who took time during the public comment periods to read the draft documents and express their views. Finally, we would like to specially thank Alan Goldfarb, Chair of the AILA Ethics Compendium Subcommittee and the members of his committee for their continued efforts in developing this resource.

Cyrus Mehta, Chair
AILA National Ethics Committee 2012-16

Reid Trautz
Director, AILA Practice & Professionalism Center

INTRODUCTION TO THE ETHICS COMPENDIUM REPORT

The purpose of this resource is to provide guidance to immigration lawyers to understand and navigate the myriad ethical issues and dilemmas that arise in immigration practice. There is often a complex interaction of state and federal rules, regulations, and laws that a meant to shape the professional behavior of lawyers practicing before federal courts, administrative tribunals, and various federal agencies.

In order to make this subject understandable and readable, we have chosen to use the same topics and numbering system of the ABA Rules of Professional Conduct. Almost all state bars use the Model Rules as a starting point for their state's Rules of Professional Conduct, but rules can differ substantially in each state.[1]

The format for each Report will be as follows:

E. Text of Rule

We will begin with the text of the ABA Model Rule that is the subject of the Ethics Compendium Report. Black letter rules are rules for breach of which discipline may be imposed, directly or by reciprocity. In addition, we will provide the text of the ABA Comments to the rule. The Comments, which are not incorporated in the rules, are only persuasive authority and provide clarification of terms and guidance as to how to implement the rule. We will also provide, if applicable, the text of any related ethical rule promulgated by EOIR, which governs the ethical conduct of immigration practitioners in particular. Immigration practitioners should be aware that they are subject, generally in the first instance, to the Rules of Professional Conduct adopted by the state in which they are admitted. Because the substance of the ABA Model Rules are very similar to most state rules, it is very helpful to be familiar with the requirements of the Model Rules and their commentary.

B. Key Terms

We will discuss in detail the key terms used in the Rule, whether formally defined or not.

C. Annotations and Commentary

We will provide our own annotations and commentary for each sub-section of the Rule, including discussion of the parallel EOIR rule ethics opinions and case law, where applicable.

D. State Rule Variations

Because some states' Rules of Professional Conduct may vary substantially from the ABA Rule, we will summarize state variations from the ABA rule, with a more detailed discussion of the variations in Appendix A.

E. Hypotheticals

We conclude with immigration law hypotheticals involving the application of the Rule and our recommendations as to the appropriate way to handle the issues presented.

Sherry K. Cohen, Reporter 2012-2017

[1]As we will discuss below, because state rules can differ from the ABA Model Rules, immigration practitioners should be mindful of the differences in the rules or any ambiguity as to how a state rule of professional conduct is applied. If immigration practitioners are in doubt, we recommend that they seek guidance from local bar associations or obtain an ethics opinion from a professional responsibility lawyer.

ABOUT THE REPORTERS

Sherry K. Cohen served as first deputy chief counsel to New York's Departmental Disciplinary Committee (DDC), First Department, Appellate Division (2003–10) and as staff attorney (1993–2003). Prior to joining the DDC, she was a litigation associate at Schulte Roth & Zabel. She graduated from Hofstra University School of Law with honors, including membership in the Hofstra Law Review. In her tenure at the DDC, Mrs. Cohen concentrated on matters involving substandard representation and unauthorized practice in the immigration area. Her notable immigration discipline cases include Matter of Wilens and Baker, Matter of Muto, and Matter of Rodkin. Mrs. Cohen is a former member of the Honorable Robert Katzman (U.S. Court of Appeals for the Second Circuit) Immigration Study Group. Although no longer practicing law, Ms. Cohen has participated in numerous CLE programs on attorney ethics and published an article in the New York Law Journal entitled *Professional Discipline: The Immigration Lawyer's Nightmare* (Jan. 31, 2013). Mrs. Cohen served as reporter for the AILA Ethics Compendium from 2012 through 2017, drafting chapters covering ABA model rules 1.1, 1.3, 1.5, 1.6, 1.7, 1.14, 1.16, 1.18, 3.3, 4.1, 5.3 and 5.5.

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Professor Theo Liebmann teaches ethics at Hofstra Law School, and has directed Hofstra's Youth Advocacy Clinic since its inception 18 years ago. Professor Liebmann regularly conducts trainings on ethical issues and on the overlap of immigration matters and family court proceedings. He has written law review articles and legal journal columns on ethical challenges in the representation of children, how ethical mandates affect the representation of immigrant children and families in state courts, the overlap between child welfare and immigration law, and the impact of family law legal standards on the physical and emotional well-being of youth and children. In his capacity as Attorney-in-Charge of the Youth Advocacy Clinic, Professor Liebmann works with law students to advocate on behalf of youth involved in the immigration and family court legal systems. Professor Liebmann and his students have represented hundreds of immigrant children in dependency and guardianship cases in family and appellate courts, as well as in immigration courts.

Professor Liebmann co-chairs a New York State Council that has issued statewide guidance related to Special Immigrant Juvenile Status, a form of immigration relief for immigrant children who have been subjected to abuse, neglect, abandonment or similar family crises; U-Visas, a pathway to lawful status for victims of crimes who cooperate with courts and other government agencies; and Adverse Immigration Consequences to Family Court Adjudications. Professor Liebmann also serves as Director of the National Institute for Trial Advocacy's Training the Lawyer to Represent the Whole Family program, a yearly week-long trial skills program for lawyers working in family courts. He is on the editorial board of the Family Court Review and serves as a Special Advisor to the American Bar Association Commission on Youth at Risk. Professor Liebmann received his B.A. from Yale University and his J.D. from the Georgetown University Law Center.

CONTRIBUTORS TO THE COMPENDIUM

AILA Ethics Committee
Cyrus Mehta, Chair 2012-16
Alan Goldfarb, Chair 2016-2018
Kenneth Craig Dobson, Chair 2018-2019

AILA Practice & Professionalism Center
Reid Trautz, Director

Board of Advisors
Michael Patrick
Helena Younossi
Philip Schrag
Nathan Crystal
Jojo Annobil
Cyrus Mehta
Kaylin Whittingham

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Caveat: The information in this Report reflects the Ethics Committee's information and views. It is not intended to constitute legal advice.

American Immigration Lawyers Association

AILA ETHICS COMPENDIUM

ABA MODEL RULE 1.1
COMPETENCE

Sherry K. Cohen, Reporter

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MODEL RULE 1.1 COMPETENCE

Introduction

An immigration lawyer who lacks competence can be subject to professional discipline by state authorities for violating Model Rule (MR) 1.1 and by the Department of Justice's Executive Office for Immigration Review (EOIR) under 8 CFR §1003.102(o), which is essentially the same as MR 1.1.[1] Lawyers who practice in the circuit courts of appeal are also subject to discipline by those courts for lack of competence.[2] And even if a lawyer's incompetent representation is overlooked by a disciplinary authority, an immigration client may try to exact compensation based on a claim of incompetent or negligent lawyering in a legal malpractice suit.

Competency is fundamental to good lawyering. Along with expecting a lawyer to be honest, no client would trust the advice of, let alone retain, a lawyer that did not at least appear to be competent. However, many clients, and even lawyers, assume that lawyers who have graduated from law school and passed the bar exam by definition are competent. That might be correct as the word is used colloquially, but not under Model Rule 1.1. Credentials alone do not guarantee competency. A lawyer may have graduated first in her class from a top law school, have years of experience, an impeccable reputation and still be found to have provided incompetent representation.

For example, a general practitioner may decide to help out a friend in an immigration matter even though he has no knowledge of or prior experience with immigration law and procedures. Unless that lawyer is able to learn about the applicable immigration law and procedures or associates with an immigration lawyer to assist or supervise the work, he would be at great risk of providing incompetent representation.

In addition, consider the immigration lawyer who handles only asylum cases, but decides to handle a comprehensive employment-based residency strategy for a high level foreign national scientist hired by a major United States company that is prepared to pay a hefty fee. This may include filing an EB-1 extraordinary ability, outstanding researcher petition, and national interest waiver, as well as a labor certification at the same time. Other options might include an EB-5 petition, if the client has a high net worth. If the immigration lawyer has no experience handling such matters and does not get up to speed prior to starting the work, he surely will not be able to provide competent representation. For the same reason, a lawyer who has handled only business– or family-related cases would be well advised to obtain experienced co-counsel or attend comprehensive training sessions before undertaking representation of an asylum case.

Even an otherwise knowledgeable, skilled, experienced and dedicated immigration lawyer may not be able to provide competent representation if she has a high volume practice, is short staffed and has to do the lion's share of the work by herself. An immigration lawyer also may be deemed to have provided incompetent representation if he is ignorant of professional responsibility rules, such as the duty of confidentiality or duty to avoid conflicts.[3]

To explain how competency is measured, MR 1.1 lists four required factors, namely, (1) legal knowledge, (2) skill, (3) thoroughness, and (4) preparation, each of which is "reasonably necessary for the representation." MR 1.1 and the comments make clear that competency does not exist in a vacuum; competency is based on what is reasonable under the circumstances. In the immigration context, because of the complexity and ever changing nature of immigration laws and procedures, when balanced against the onerous consequences to the client if the

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[1] MR 1.1 is really the first "rule" of professional responsibility preceded only by the Terminology section under MR 1.0. "Competence" is not defined in MR 1.0, but the requirements of competent representation are set forth in MR 1.1.

[2] *See, e.g.*, United States Court of Appeals, Second Circuit, *In Re: Douglas Payne, Slip op.* No. 10–90019–am. (Jan. 25, 2013) (Public reprimand for immigration lawyer who allowed defaults in numerous petitions and filed inadequate brief, among other practice infractions); *Matter of James L. Rosenberg*, 24 I&N Dec. 744 (BIA 2009) (reciprocal discipline imposed on California attorney suspended from practicing before the Ninth Circuit based on incompetent representation in numerous petitions before that court.)

[3] As we will discuss further, competent representation would also require that a lawyer be aware of other professional responsibility rules which, among others, relate to or have an impact on competent representation, such as MR 1.2 (limitations on scope of representation), MR 1.3 (diligence), MR 1.6 (confidentiality), MR 5.1 (supervision of lawyers), MR 5.3 (supervision of non-lawyers), MR 5.5 (unauthorized practice).

lawyer fails to deliver competent representation, the prudent and conscientious immigration lawyer must always consider in the first instance whether he is able to provide the competent representation required under MR 1.1.

MR 1.1 is simply worded and may even be considered obvious. But its simplicity may provide a lawyer with a false sense of security if the lawyer relies solely on his good faith belief that he knows what he is doing and cares about providing quality representation. There are many questions that are not answered by a plain reading of the rule. For example:

Since MR 1.1 provides that a lawyer "shall" provide[4] competent representation, does that mean that any error in the representation would amount to a violation of the rule?

Would consultation with a "mentor" or more experienced colleague, without more, satisfy the knowledge and skills components of MR 1.1?

Would a lawyer be deemed incompetent based on the sub-standard performance of his non-lawyer staff?

May a lawyer provide competent representation without direct in person contact with the client?

How would a lawyer's knowledge and use of electronic communication and storage of confidential information affect competency in the representation of a client?

How might a violation of MR 1.1 trigger a legal malpractice claim and vice versa?

Does a lawyer's limitation of legal services under MR 1.2 protect the lawyer from a claim of incompetency?

We begin our discussion of MR 1.1 below by discussing the wording of the rule in the first instance and then the comments. We will focus on representative disciplinary decisions, ethics opinions which provide guidance, special areas of concern such as malpractice actions and ineffective assistance of counsel claims. We will also provide and discuss various immigration law hypotheticals involving competence. Lastly, because some state competence rules vary from MR 1.1, we will provide a summary of state variations, *keeping in mind that prudent and conscientious lawyers will be sure to carefully read their home state's professional responsibility rules.*

A. Text of Rule

8 CFR §1003.102 – Grounds for Discipline

A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:

> (o) Fails to provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.[5]

[4] As reflected in the Summary of State Variations below, a state's competency rule may vary from MR 1.1. For this reason lawyers should check their home state's rule focusing on the differences highlighted in the State Variations section herein. For example, New York's Rule 1.1 substitutes the word "should" for "shall."

[5] As for disciplinary sanctions ordered by the Executive Office of Immigration Review (EOIR), in general, the vast majority of published cases, in which immigration lawyers are censured, suspended or disbarred, are based on sanctions imposed by state and other federal jurisdictions. Under the doctrine of reciprocal discipline, the EOIR may impose professional discipline, generally without a hearing, based on a finding of professional misconduct by another jurisdiction, most often without a hearing. For immigration lawyers, suspension from practice by a state or other federal jurisdiction could result in a bar to practicing before the USCIS, Immigration Court or the BIA, and vice versa.

Although the EOIR may commence a disciplinary investigation on its own, there are very few reported original jurisdiction cases. Other EOIR original jurisdiction matters appear to be handled through what is described as "informal discipline" which is private and confidential. Generally, informal discipline is appropriate where the level of misconduct is not severe and lawyer has no prior disciplinary history with the EOIR. For an overview the EOIR disciplinary process, *see* EOIR Fact Sheet: EOIR's Disciplinary Program and Professional Conduct Rules for Immigration Attorneys and Representatives (Feb. 27, 2013).

ABA Model Rule 1.1 Competence

ABA Model Rule 1.1—Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment— Model Rule 1.1

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality), and 5.5(a) (unauthorized practice of law). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

B. Annotations and Commentary

MR 1.1 First Sentence

> **First Sentence**: A lawyer shall provide competent representation to a client.

The first sentence of MR 1.1 states what would otherwise appear to be a given. Of course, a lawyer should provide competent representation. But the first sentence of the rule makes clear that competent representation is not aspirational: A lawyer "shall" provide competent representation.[6] On its face the failure to do so is a per se violation. The requirement is not qualified by the term "knowingly" or even a lawyer's good faith belief that he is providing competent representation. While a one time lapse in competency resulting in a "mistake" likely will not result in a disciplinary investigation, any lawyer who decides to represent a client without establishing competency does so at his peril.[7]

By way of limitation, the duty of providing competent representation under MR 1.1 applies only to the lawyer's client. In this respect, MR 1.1 is similar to many other rules in which the scope of a lawyer's professional duty is limited to representation of a client, as opposed to other rules that concern the lawyer's general conduct.[8]

In the immigration context, lapses in competent representation might include the failure to meet a filing deadline due to a mistake in calendaring; filing an application at the incorrect address, resulting in a rejection and the missing of a deadline; checking off an obviously incorrect box on a form; failing to include crucially obvious supporting documentation with an application; failure to seek the appropriate benefit or relief or failure to ascertain the immigration consequences of criminal conduct. They may also include the failure to depose a client's witness, relying on a client's memory instead of using available resources to double check important dates, and ignoring red flags.

MR 1.1 Second Sentence

> **Second Sentence:** Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The second sentence of MR 1.1 provides what amounts to a definition of "competency" comprised of four components: legal knowledge, skill, thoroughness and preparation. The second sentence also qualifies the four

[6] As noted previously, New York's version of Rule 1.1 substitutes "should" for "shall."

[7] As we discuss below, Comment 3 to MR 1.1 gives a lawyer some leeway when a lawyer is asked to provide legal advice in an emergency situation.

[8] *See* MR 4.1 which prohibits knowing misrepresentations by lawyers in the course of representing a client compared with MR 8.4(c) which prohibits knowing misrepresentations and dishonesty in any context.

components by including the phrase "reasonably necessary for the representation".[9] It makes sense to apply the reasonable lawyer standard particularly where the rule has no explicit exceptions.

The attempt to apply a narrow reading of the four terms can be tricky because they often overlap. For example, legal knowledge and skills may be hard to distinguish when it comes to a lawyer's ability to apply the facts of a matter to the law. Similarly, a lawyer's ability to attain sufficient knowledge of the law may be hampered by poor research skills, particularly lack of familiarity with the kind of information that may be obtained using the Internet. The comments to MR 1.1 make clear that maintaining competency includes keeping up with technology as it is used in the practice of law, such as in the area of electronic communication and storage.[10] The line between thoroughness and preparation also may be blurred. A lawyer who is not thorough in research may not be able to obtain sufficient knowledge of the law. The failure to adequately prepare by assembling and organizing documents in time for a hearing may negatively impact a lawyer's trial skills, for example.

As a general matter what amounts to competency in a case will always depend on what is reasonably necessary under the circumstances. With these considerations in mind, we discuss briefly the articulated components of competency under MR 1.1 below.

Legal Knowledge

Legal knowledge comprises both the lawyer's general knowledge of the law and procedures, as well as information gained from specific research tailored to the matter at hand. Comment 1 to MR 1.1 advises that factors relevant to establishing legal knowledge for the representation include:

The relative complexity and specialized nature of the matter

The lawyer's general experience

The lawyer's training and experience in the field in question

The preparation and study the lawyer is able to give the matter

Feasibility of referring the matter to, or associating or consulting with, a lawyer of established competence in the field in question

In addition to being expected to be familiar with well-settled legal principles, as well as the statutory basis for the relief sought, a lawyer must know and be able to comply with the applicable rules of procedure.[11] However, as reflected in the Comments, if a lawyer does not know the substantive law or procedural rules applicable to the client's matter, she can still learn them through research and study.[12] The failure to conduct such research may support a finding of incompetence.[13] In addition because of the Internet and the ease with which agencies and courts conduct their own research, lawyers today will be held to a higher standard of knowledge than in pre-Internet days.[14] Even when a lawyer understands that further study is required, a lawyer must consider whether he

[9] Under MR 1.0(h) the term "'Reasonable' or 'reasonably' when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." The "reasonably necessary" standard can be found in other disciplinary rules as well. *See, e.g.,* Rule 1.6(b).

[10] Comment 8 to MR 1.1 provides that to:

...maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

[11] *See, e.g., In re Hagedorn*, 725 N.E.2d 397 (Ind. 2000) (in adoption matter lawyer demonstrated lack of knowledge of essential procedures, such as including pre-placement evaluation, termination of parents rights and preparation and filing of petition); *In re Moore*, 494 S.E.2d 804 (S.C 1997) (in medical malpractice case, lawyer failed to learn when statute of limitations began to run).

[12] Comment 2 to MR 1.1 acknowledges that a "lawyer can provide adequate representation in a wholly novel field through necessary study."

[13] *See, e.g., Baldayaque v. U.S.*, 338 F.3d 145 (2d Cir. 2003) (in criminal matter in which client faced deportation, lawyer's failure to conduct cursory legal research concerning specific motion requested by client violated Rule 1.1).

[14] Margolis, Surfin Safari-Why Competent Lawyers Should Research on the Web, 10 Yale J.L & tech. 82 (2007).

has the time and resources to research and comprehend the law and procedural rules. If he doesn't, he may have no choice but to associate with or refer the matter to a competent lawyer.[15]

For example, for a marriage-based residency matter, assuming that the marriage is bona fide, the lawyer will have to know whether the client is eligible to adjust status in the United States or whether the client must leave the United States to process the immigrant visa at a U.S. consulate. If the latter, then the lawyer must be able to further ascertain whether departure from the United States will trigger other consequences such as the three and ten year bars under INA §212(a)(9)(B)(i)(I) and (II).

Skills

The concept of legal skills overlaps with that of legal knowledge to some degree. Basic legal skills generally include the ability to analyze precedent, evaluate evidence, and draft legal documents.[16] Indeed, attaining these general skills is an essential part of a legal education. "Legal skills" as an element of competence may be gained by substantive education and experience in a particular area of law or a particular agency, court or type of proceeding. A lawyer without education and experience in a particular area presumably would have to take steps to achieve the requisite skills.

For example, for representation in a marriage-based residency petition, an immigration lawyer would, among other tasks, need to be able to evaluate the evidence establishing the bona-fides of the marriage, prepare and file the required forms, and interact with USCIS officials and other employees.

Thoroughness

Thoroughness involves the manner in which various legal tasks are provided including the extent of the lawyer's pursuit of all factual and legal issues reasonable under the circumstances. In that regard, thoroughness may overlap with the duty of "reasonable diligence" required under MR 1.3.[17] The degree of thoroughness required will depend on the nature of the representation as in the case of the other components which make up competency. Matters in which the stakes are high or more complex generally will require more extensive attention than simpler matters or those with lesser consequences.[18] Where a lawyer is not able to provide the necessary thoroughness, the lawyer and the client may agree to limit the scope of the lawyer's responsibility, keeping in mind that a lawyer can never limit the representation to the point of incompetence.[19]

In the immigration context, for example, although an N-400 application for naturalization may look relatively straightforward, it may be necessary for the lawyer to investigate the circumstances under which the client obtained permanent residency. If the client improperly obtained permanent residency, this issue may come up during the naturalization process. Similarly, past criminal convictions may trigger deportability even if the client may appear to be eligible for naturalization. This does not suggest that the lawyer does not take up a matter, where say a past criminal conviction may or may not trigger deportability, but the lawyer must thoroughly apprise the client and seek the client's informed consent relating to the risks of going forward. There may be times when it may be prudent to request a copy of old records under the Freedom of Information Act (FOIA), even though this might take time. Of course, it may not always be practical to make a FOIA request prior to filing every

[15] This would include consideration as to whether the lawyer has an adequate office resource library. *See, e.g.*, Matthew J. Maiona, Nicole Lawrence Ezer and Nita J. Itchhaporia, "From Getting Work to Getting Paid: Strategies for Starting Your Own Immigration Law Practice", *AILA Immigration Practice Pointers* 1 (2011–12 ed.)] (among others, reference and research books include *Kurzban's Immigration Law Sourcebook* (2014 ed.) and AILA*Link* (providing online resources without having to purchase individual books).

[16] *See* Comment 2 to MR 1.1.

[17] MR 1.3 provides that a lawyer "shall act with reasonable diligence and promptness in representing a client."

[18] *See* Comment 5 to MR 1.1.

[19] *See* MR 1.2(c) which permits reasonable limitations on the scope of the representation if the client gives informed consent. *See, e.g., Flatow v. Ingalls*, 932 N.E.2d 726 (Ind. Ct. App. 2010) (in connection with lawyer's representation of client as to his claim for defamation in litigation involving other legal claims, malpractice suit based on lawyer's failure to respond to adversary's summary judgment motion involving three other issues in the litigation dismissed on grounds that lawyer's carefully drafted retainer agreement specified that firm would handle only one aspect of client's litigation).

application for an immigration benefit, and the lawyer must decide when to make a FOIA request on a case-by-case basis.

Preparation

Preparation involves the lawyer's ability to apply the knowledge, skills and thoroughness she has invested in the representation. Of great importance is the lawyer's gathering and organizing the established facts and applicable law. Adequate preparation may call for timely review of the facts and law so that they can be called to mind easily at an oral argument, or at a hearing. It may even include the physical assembly of documentary evidence for submission in court or as exhibits to a brief. It may apply to the ability to timely file papers.[20] Preparation is particularly important in immigration cases in which clients need to be prepared for interviews by immigration authorities or to testify at a merits hearing.

Reasonably Necessary for the Representation

MR 1.1 qualifies the level of required knowledge, skill, thoroughness and preparation as that which is reasonably necessary for the representation. As a result the mandate that a lawyer "shall" provide competent representation is given at least some flexibility. That makes sense because it would be wrong to conclude that MR 1.1 requires nothing less than flawless representation. Even the best lawyer can make an inadvertent error and without more, the mistake (or error in judgment, perhaps) should not amount to a violation of MR 1.1 warranting discipline. However, that may not be the case when it comes to malpractice if the mistake can be shown to have caused the client injury. In either case, competency is based on the standard of care in the legal community in which the lawyer practices or, putting it another way, the reasonably competent lawyer standard.

With the notion of reasonableness in mind, the Comments to MR 1.1 acknowledge that there may be circumstances where a lawyer is asked for advice or assistance in an emergency context in an unfamiliar area of law or before she has had the chance to obtain all the facts, let alone conduct legal research. In such a situation, under MR 1.1 a lawyer would not be held to the same standard of care required when the lawyer has the necessary time to consider a client's matter. Even so, a prudent and conscientious lawyer would be wise to limit the advice provided in emergency circumstances to only that which is "reasonably necessary" at that time. In such situations the lawyer might also qualify the advice, especially if the lawyer is uncertain, as this is something the client would want to know in deciding whether to seek another opinion, if time permits.

For example, an immigration lawyer, with no experience in criminal law, may get a call from a desperate former client seeking advice about being arrested for participating in a bar-room brawl. Under such circumstances, the lawyer could probably advise the client to refrain from answering any questions about the brawl or otherwise offering information. The lawyer would then have to decide if he could take steps to attain competency in a criminal matter or refer the matter to a lawyer who practices criminal law.

As another example, an immigration lawyer with no federal court experience may need to file a habeas corpus petition and a motion for a temporary restraining order in federal district court to protect a detained client from imminent deportation despite his pending request for a stay of removal and a motion to reopen with the Board of Immigration Appeals. In such situations, if there is time, the prudent and conscientious lawyer would most likely have to associate with another competent lawyer or refer that task to a competent lawyer.

Representative Disciplinary Cases: Do Immigration Lawyers Really Get Disciplined for Incompetence?

Yes! Lawyers are disciplined for incompetence, but at least with respect to public reprimands, suspensions and disbarments, rarely—if at all—on the basis of incompetence alone.[21] This is probably the case because a

[20] *See, e.g., Matter of Shakir*, 46 A.3d 1162 (Md. 2012) (failure to make the proper and required filings in a client matter demonstrates a lack of the appropriate preparation and thoroughness necessary to provide competent representation in violation of Rule 1.1).

[21] Extensive research of published decisions has not revealed any case in which a lawyer has been disciplined solely on the basis of incompetence. That may be so because disciplinary bodies almost never sanction lawyers for violating Rule 1.1 unless the lawyer engaged in some other rules violation (such as neglect of cases, a violation of Rule 1.3, or misappropriation of client funds) that is also charged and proved.

lawyer who renders incompetent representation will usually fall short in fulfilling other ethical duties as well. For example, incompetent lawyers are also more likely to fail to keep their clients apprised of the status of the matter (MR 1.4), attempt to cover up the incompetent representation by lying to the client or even creating fictitious documents (MR 8.4(c)), fail to exercise diligence in rectifying or mitigating the incompetent representation (MR 1.3), or refuse to return what turns out to be an unearned fee (MR 1.5.), among others.[22] In other instances, the same conduct deemed incompetent representation in violation of MR 1.1, *e.g.*, unreasonable delay in filing papers or filing papers with the wrong court, may serve as a basis for finding that the lawyer also failed to act with diligence in violation of MR 1.3.[23]

Immigration lawyers may believe that a significant number of immigration clients are too worried about their legal status or lack the sophistication or language skills to file a disciplinary complaint, but they are wrong.[24] In many cases, those clients retain new lawyers to repair the damage caused by sub-standard legal representation. Frequently, the new lawyers assist the clients in filing disciplinary complaints, in particular when moving to reopen a matter because of ineffective assistance of counsel.[25] As for business immigration clients, many have the resources to file a disciplinary complaint, especially when they feel they did not get their money's worth. Lastly, courts may refer lawyers for disciplinary investigations on their own. We discuss representative disciplinary cases below.

Incompetent Conduct Warranting Discipline

Repeated Acts of Incompetence

As discussed, there are times when an otherwise prudent and conscientious immigration lawyer is just not able to render competent representation in a particular matter. Whether or not the lawyer will be subject to discipline often depends on a variety of factors, most important of which is the lawyer's acknowledgment of his misconduct, her disciplinary history and her ability to demonstrate that it will not happen again. But there are other immigration lawyers who seem to never learn; they engage in repeated and similar acts of incompetence, such as failing to file papers timely, filing perfunctory motions devoid of required arguments, failing to respond to government motions or requests, or filing the wrong claim for relief altogether. Such lawyers lack any awareness of what competent representation is altogether.

Failures to Submit Necessary Papers and Submission of Substantively Insufficient Papers

A lawyer appeared before a federal circuit court of appeals over a seven-year period filing numerous petitions for review of BIA decisions, many of which were dismissed because of the lawyer's incompetence. In particular, he repeatedly (1) failed to respond to court orders, file opening briefs or respond to government motions to dismiss, (2) filed perfunctory motions for stay of removal and briefs that lacked sufficient legal argument and references to the record and (3) waived important essential issues helpful to the client.[26] The court commenced a

[22] *See, e.g., Attorney Grievance Commission v. Heung Sik Park,* 46 A.3d 1153 (Md. 2012) (in addition to providing incompetent representation in immigration matter, lawyer abandoned clients by failing to pursue their interests, failed to communicate with clients (ignoring their repeated requests for status updates), terminated the representation without notice by failing to provide effective services, and failed to return an unearned fee in violation of *Rules of Prof. Conduct, Rules 1.1, 1.3, 1.4, 1.16(d), 8.1(b),* and *8.4(d).*

[23] *See e.g. In Re Hansen,* (La. 2004) (unreasonable delay in filing Visa applications supported conclusion that lawyer violated both Rule 1.1 and 1.3; lawyer also attempted to conceal delay through misrepresentations in violation of LA Rule 8.(4)(c))

[24] For example, in New York's Departmental Disciplinary Committee (Appellate Division, First Department), which has jurisdiction over lawyers who practice in Manhattan and the Bronx, approximately eight to ten percent of the total complaints filed between 2007 and 2013 involved immigration lawyers, as reported by its Chief Counsel, Jorge Dopico.

[25] We discuss ineffective assistance complaints below.

[26] *See Matter of Rosenberg,* 2010 Calif. Op. LEXIS 15 (Sept. 30, 2010) (based on findings in a Ninth Circuit disciplinary action, reciprocal discipline imposed against California lawyer who, notwithstanding 30 years admission to bar, engaged in numerous and repetitive acts of incompetence in cases before the Ninth Circuit in violation of Cal. Rule 3-110 (which differs somewhat from MR 1.1), court found that the lawyer's actions "repeatedly demonstrated lack of competence that ... harmed his clients..."); *see also In the Matter of Frank Sprouls,* 2010 Calif. op. LEXIS 5 (Aug 1, 2010) (in reciprocal discipline action, lawyer violated Cal. Rule 3-110 based on numerous and repetitive acts of incompetence in cases filed before the Ninth Circuit by filing deficient briefs which failed to cite persuasive cases in support of arguments, failing to otherwise respond to government motions, using an incorrect case number in motion, and failing to preserve a key due process argument for consideration by the circuit court; citing Ninth Circuit holding that Sprouls's deficient performance was "plain on the face of

sua sponte investigation finding that such conduct violated the state's competency rule [here, California]. The court did not identify the particular components of competency as stated in the rule,[27] but it is clear that the lawyer's incompetence was so pervasive, he had no clue as to what competent representation required. Most of the misconduct at issue arose from the lawyer's lack of preparation and thoroughness, which likely impacted the lawyer's knowledge of the law and procedures, let alone skill. Overall, the lawyer's conduct reflected a cavalier attitude toward the duty of competent representation to the client and to the court itself.

Shoddy Work All Round

Another example of a pattern of incompetence in which a lawyer was disciplined arose from the lawyer's sub-standard representation in three immigration matters.[28] In one case, the lawyer filed a motion to reopen designed to stay deportation which consisted of only three sentences, missed essential elements as to the reasons for the relief sought, and lacked legal analysis, a statement of facts, background procedural history or proof of service. In the second case, the lawyer failed to advise his client of a hearing date and when the client failed to appear, he did not seek a continuance blaming the client for not appearing. The lawyer compounded his misconduct by filing an appeal eight months later, rather that filing a motion to reopen as the immigration court had instructed. To make matters worse, the appeal was only two sentences in length with no legal argument. In the third case, the lawyer failed to do any legal research to support three offered defenses to a removal order, even though he had time to prepare, and he also failed to advise the client about needed documentation. At the client's hearing, the documents that were offered were not admitted because the lawyer had not arranged for translations as required. The lawyer did not present adequate support for relief at the trial, calling only the client as a witness. After the case was dismissed, the lawyer submitted a three-paragraph appeal which failed to sufficiently address or even differentiate the various defenses.

Based on the above, the court concluded that the lawyer clearly rendered incompetent representation but it did not discuss the components of the competency rule. Given the overall poor quality of the representation, there was no way the lawyer could have demonstrated that he possessed the legal knowledge, skill, preparation and thoroughness necessary to deliver competent representation. On the contrary, it is obvious that he lacked knowledge of the law and court procedures, did not adequately prepare for his client's hearing, was not thorough in gathering persuasive evidence and exhibited no skill in his brief writing.

Lack of Preparation, Thoroughness and Skill

As in the case of many other practice areas, the competent practice of immigration law requires timely filing of papers with the proper forum, attendance at scheduled court hearings, regular communication with clients, and timely responses to agency requests for information, among others. Immigration lawyers at a minimum must also conduct a reasonable investigation into a client's history with immigration authorities. The ability to fulfill these obligations will depend to a large degree on the lawyer's skills, preparation and thoroughness in a matter.

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the administrative record and rises to the level of a due process violation because [client] 'was prevented from reasonably representing his case'" and thus violated Cal. Rule 3-110). *See Summary of State Rules that differ from MR 1.1 at pp. 1-32.*

[27] California's Rule 3-110 (Failing to Act Competently), differs somewhat from MR 1.1 in that unless the lack of competence derives from intentional or reckless conduct, a lawyer violates the competency rule only when he "repeatedly" fails to perform legal services competently. The rule provides as follows:

(A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. [Emphasis added]

(B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

(C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

[28] *Cincinnati Bar Association v. Sigalov*, 975 N.E.2d 926, 133 Ohio St.3d 1, 2012-Ohio-3868 (Ohio 2012) (in the representation of five personal injury and three immigration cases "magnitude of Sigalov's misconduct, encompassing fraud, gross neglect, duplicity, incompetence, and the fleecing of clients...[was] truly egregious").

Failure to Invest Time and Effort to Cure Insufficiencies in Filing

In one case in which discipline was imposed, a lawyer filed a permanent residency application with insufficient support and then failed to respond to the USCIS's follow-up request for information. He also compounded his wrongdoing by failing to advise the client about the request for more information. As a result, the application was denied. Here, the lawyer's initial incompetence could have been rectified if he had simply provided the requested information.[29] A prudent and conscientious lawyer would have been prepared to obtain the needed information and been thorough in following through on the request. Not surprisingly, the disciplinary authority found that the lawyer violated Rule 1.1 because he had failed to demonstrate that he possessed any of four components that comprise competency, let alone preparation and thoroughness.

Failure to Prepare and Appear

Given that court dates are usually arranged in advance and on notice, sometimes even to accommodate the lawyer's schedule, a lawyer who is not prepared to go forward with a hearing, without a valid excuse, fails to render competent representation. When the same lawyer fails to explain to his client what happened at the hearing and also fails to appear at a later hearing after receiving notice, the lawyer clearly is lacking in preparation and thoroughness, and thus, is not competent.[30]

Failure to Appear and Poor File Maintenance

In a removal case, the client appeared but his lawyer did not and she did not otherwise make herself available for contact by the court. After the hearing, the immigration judge ordered the client to voluntarily depart the United States within 120 days. The client hired a new lawyer who attempted to get the file from the lawyer. After many unanswered requests and delay, the lawyer sent only an incomplete file and the new lawyer was forced to go forward without it. The court found that the first lawyer violated the state's competency rule, in particular, by failing "to employ the requisite thoroughness and preparation in his representation" of the client.[31]

Failure to be Thorough in Following Court Procedures

In another removal case, a lawyer failed to file an EOIR-42B form with the immigration court as requested, filing it instead with the Texas Service Center. As a result, the client's application was denied and the client was forced to accept voluntary departure. Although the lawyer filed an appeal, he did not provide a copy of the required bond receipt timely and the client was ordered deported. In the disciplinary hearing, by way of mitigation, the lawyer testified that he had changed his office procedures to ensure in the future that immigration filings would be done properly. However, the court concluded that because the lawyer had practiced mainly immigration law for 25 years, he knew or should have known about the harsh consequences to his clients of missing filing deadlines. The lawyer was found to have rendered incompetent representation.[32]

Failure to Adequately Investigate Facts and Law and to Correct Mistakes

In another case dealing with incompetence, an otherwise knowledgeable and skillful lawyer basically dropped the ball in his handling of two immigration matters. In one case, where a prior petition had been filed by another lawyer and denied, the new lawyer filed virtually the same papers before the immigration court (the wrong forum) which dismissed the petition for lack of jurisdiction. The lawyer then failed to re-file with the BIA which did have jurisdiction. The court attributed the lawyer's misconduct to his failure to analyze the facts of the case, contact the client's prior lawyers and meet with the client or explain the slim chance of success in pursuing his legal strategy. In

[29] *Heung Sik Park*, 46 A.3d 1153, *supra* (lawyer prepared and filed incomplete applications and failed to act timely in providing additional information requested by USCIS and completing the process; clear and convincing evidence that lawyer failed to demonstrate the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of the client under MLRPC 1.1.).

[30] *See Statewide Grievance Committee v. Friedland*, 609 A.2d 645 (Conn. 1992); *Matter of Shakir*, (46 A.3d 1162 (Md. 2012), *supra.*

[31] *See In re Ohaebosim,* 279 P.3d 124 (Kan. 2012) (lawyer failed to employ the requisite thoroughness and preparation in his representation of the client in removal proceedings in violation of *KRPC 1.1*).

[32] *State of Nebraska Ex. Reel. Counsel for Discipline of the Nebraska Sup. Ct. v. Wilson*, 811 N.W.2d 673 (Neb. 2012) (failure to follow well-established procedural rules in immigration matter amounts to incompetence under NE 3-501.1 [analogous to Rule 1.1].

a second case, involving a deportation based on a criminal conviction, the lawyer filed a cancellation of removal claim, but the lawyer failed to gather and present evidence of the extreme hardship claim, a required element of the case, telling the client that it was his responsibility. The lawyer proceeded to file a petition that was filled with mistakes that his clients had pointed out to him prior to the filing. In finding that the lawyer violated Rule 1.1, the court observed ironically that the lawyer appeared "to possess the skills to competently represent immigration clients, [but] he failed to use those skills to timely analyze the factual and legal elements of his client's legal problems, and failed to use methods and procedures to meet the standards of a competent practitioner."[33]

Failure to Investigate and Submit Sufficient Papers; Bad Legal Advice

Here, the lawyer agreed to represent a client whose prior marriage-based residency application was denied on the basis that it had been abandoned. The lawyer promised to file a Form I-130, a Petition for Alien Relative, and a Motion to Reopen the original "abandoned and denied" application, together with Form I-485, an application to adjust status. However, the lawyer took no steps to determine why the client's case was considered abandoned even though that information was relevant to the motion to reopen. But in any event, the lawyer filed no motion at all and did not even file a notice of appearance, falsely telling the client that he had. The lawyer also provided bad advice to the client that she now needed to return to her home country to pursue permanent residency in the United States through consular processing without telling her that she would be subject to a ten-year bar unless she received a waiver. The court found that the lawyer's conduct violated Rule 1.1 in that he clearly did not provide competent representation.[34]

Multiple Failures to Follow Through on Court Directions Designed to Assist Clients Obtain Relief

In a cancellation of removal case, a lawyer was disciplined for engaging in multiple failures to heed a sympathetic immigration judge's explicit directions designed to help the lawyer's clients meet the heavy burden of establishing the "exceptional and extremely unusual hardship" standard.[35] At the master hearing, the judge advised the lawyer that he needed "significant documentation" to establish the hardship including documentary proof of the client's child's learning disability. The lawyer was also given an information sheet for gathering needed personal information, including fingerprints. The lawyer failed to provide the information at the first merits hearing. The judge gave the lawyer another 30 days to augment the file concerning the child's learning disability, including "letters from teachers and doctors and information regarding the special educational prospects in Mexico." The lawyer's clients did not appear at the next hearing because the lawyer failed to notify them of the rescheduled date, attributing the failure to a miscommunication by his office personnel. The judge agreed to reschedule the matter for another ten months.

During that period the lawyer submitted documents that were rejected for failing to comply with filing requirements, but the immigration judge accepted them nevertheless and the hearing was rescheduled for another six months. The lawyer never submitted the letters requested by the judge. Ultimately, the immigration judge reserved the case for further written submissions and closing arguments, but the lawyer submitted neither. In addition, the country conditions reports he submitted showed no details about the special education opportunities available in Mexico, focusing on pervasive violence in Mexico. The judge ordered the clients deported.

In his defense, the lawyer argued that the letters he had obtained were not helpful. The disciplinary authority found that the lawyer failed to use the "methods and procedures meeting the standards of competent practitioners" by demonstrating a lack of preparation, in particular "failure to follow the roadmap laid out by the immigration

[33] *People v.Walker*,135 P.3d 71 (Colo. O.P.D.J. 2005).

[34] *Attorney Grievance Commission v. Bahgat*, 984 A.2d 225 (Md. 2009) (lawyer "literally did nothing on [client's] behalf beginning with failure to even enter appearance and subsequent lack of performing any services, whatsoever").

[35] *Matter of Howe*, 2014 ND 44, No. 21030299, slip.op. (Sup. Ct. N.D. Mar. 11, 2014) (lawyer's overall failure to heed immigration judge's directions and comply with procedural rules amounted to violation of Rule 1.1; lawyer also failed to act with diligence in violation of Rule 1.3, failed to adequately communicate with clients in violation of Rule 1.4, failed to properly supervise non-lawyer staff in violation Rule 5.3).

judge." The lawyer thus did not act competently.[36] Notably, the disciplinary authority rejected the lawyer's claim that part of his strategy was to keep his clients in the United States for as long as possible "at all costs" reasoning that a competent (and diligent) lawyer "would not seek delay by purposely failing to file documents requested by the judge, and would not refrain from telling his clients about hearing dates in the hopes [the] trial would be delayed."

Undertaking Representation without Sufficient Knowledge

As discussed, when a lawyer has no basic knowledge of immigration law, but agrees to represent immigration clients without taking steps to gain sufficient knowledge, the representation is likely a disaster waiting to happen. The lawyer not only exposes himself to disciplinary action, but is more likely to be subject to a malpractice suit, as well.[37] More importantly, the lawyer also exposes the client to loss of status or removal.

No Knowledge of or Experience with Immigration Law

A lawyer with no experience in immigration law agreed to accept referrals of Spanish speaking clients from a current non-lawyer client who told the lawyer that he was familiar with immigration law because he had previously worked as a translator and legal assistant at an immigration law firm.[38] The lawyer accepted at face value the non-lawyer's assurance that the practice of immigration law consisted of just filling out of forms and making a few court appearances. The lawyer did not speak Spanish and relied primarily on the non-lawyer to prepare the applications and advise the clients without proper supervision.[39] Because the lawyer was ignorant of immigration law, the applications he filed did not contain sufficient information. He also lacked knowledge of the risks associated with placing the clients in deportation hearings and the harsh standards they would have to meet to attain legal status as a result in a change in the law.

Had the lawyer in this case done even the most basic research, *e.g.*, by consulting an immigration law treatise, running the scenario by an experienced immigration lawyer or even doing a simple Google search about immigration law, he would have realized he was not competent to represent immigration clients. Moreover, the idea of relying on a non-lawyer with purported contacts in the "community" is rife with potential problems, some even involving possible criminal liability for the unauthorized practice of law. Reputable immigration lawyers with experience in representing clients in the Hispanic or Chinese communities, for example, are familiar with non-lawyers (known as "notarios" or so-called travel or employment agents) who improperly associate with unscrupulous or naive lawyers, with little or no experience in immigration law.[40]

A Favor for a Colleague Gone Wrong

At the request of a colleague, a lawyer whose practice primarily involved business matters, not immigration, undertook representation of clients in obtaining investment visas (E-2) based on their purchase of a business in the United States.[41] The lawyer filed the investment-based visa application on the wrong form. As a result the application was denied, but the lawyer did not inform the clients. Months later, the lawyer re-filed the investment visa application on the correct form without his client's knowledge. This time the application was denied because the lawyer did not respond to the USCIS's request for further documentation as to the source of the funds the clients were using to purchase the business.

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[36] *Id.* (lawyer "demonstrated a lack of preparation, including failure to follow filing requirements, failing to file in a timely manner, failing to obtain supplementary information requested by the immigration judge and failing to provide a written submission or closing argument when given the opportunity").

[37] With respect to malpractice claims, at least one liability carrier reported that half of the claims it pays out each year is attributable to "attorneys practicing in areas they do only ten percent of the time" Zemlicka, Exploring Unfamiliar Territory, Wis. L.J. (Apr. 15, 2011).

[38] *In re Kasynski*, 620 N.W. 2d 708 (Minn. 2001) (lawyer demonstrated a pattern of incompetence in his representation of immigration clients, an area of law in which he in fact had little or no knowledge or experience, and in which he made no apparent effort to acquire competence.).

[39] This alone would amount to a separate violation of Rules 5.1 and 5.3 pertaining to supervision of lawyers and non-lawyers.

[40] *See, e.g.*, *Matter of Muto*, 739 N.Y.S.2d 67 (1st Dept. 2002); *Matter of Rodkin*, 21 A.D.2d 111 (1st Dept. 2005).

[41] An E-2 visa is issued to a non-U.S. citizen who proposes to make a substantial investment from abroad into a United States business, and allows the non-U.S. citizen to remain in this country to work in that business.

When the clients learned the status of their case and confronted the lawyer, he misrepresented that he had filed a motion to reopen. In fact, he had not. In sustaining the various charges lodged against the lawyer, among them a violation of Rule 1.1, the disciplinary authority found that the lawyer's conduct was not "technically competent or thorough and knowledgeable" and he "failed to serve [the clients] with skill and care commensurate with that generally afforded clients by other lawyers in similar matters." Not surprisingly, the lawyer was found to have rendered incompetent representation and violated other rules concerning diligence, adequate communication with clients and dishonest conduct.[42]

Representative Malpractice Claims: When Is a Wrong Result Malpractice?

Although the number of immigration malpractice cases filed each year is relatively low compared to other practice areas,[43] immigration lawyers who provide incompetent representation may wind up being sued for malpractice irrespective of whether or not the client files a disciplinary complaint or the lawyer is found to have violated Rule 1.1. For that reason alone, immigration lawyers should be mindful of Rule 1.1 even if only to help avoid malpractice.

To prove legal malpractice, in general, a plaintiff must:

Prove a lawyer-client relationship existed between the plaintiff and the lawyer

Establish the standard of care in the community (usually though the testimony of an expert witness)

Prove that but for the defendant lawyer's negligence [deviation from the standard of care] the lawyer would have been successful in the underlying matter.[44]

We discuss representative immigration malpractice actions below. As reflected in the cases, the question of whether the lawyer engaged in malpractice often turns on the opinion of expert testimony as to the standard of care necessary for a particular form of relief.[45]

Expiring Visas

A case involving the handling of an H-1B visa illustrates the importance of having expert testimony where what amounts to negligence is beyond the ordinary experience of a fact-finder.[46] Here, in connection with immigration work regularly handled for an employer, the lawyer obtained a non-immigrant temporary working visa for a foreign national, who worked for the employer. With the expiration date of his visa approaching, the foreign national asked the lawyer to take steps to continue his legal status. Although the foreign national was currently employed by the company for whom the lawyer did immigration work, there had been a period of 16 months when he had not worked for the company. Apparently, because the foreign national had not been continuously employed, a pre-requisite of filing for an extension, the lawyer filed a petition without requesting an extension of status. According to the lawyer, he took this approach relying on the company's employment records that the foreign national was let go and then rehired, not "benched" as the foreign national maintained. With

[42] *In re Vohra*, 68 A. 3d 766 (D.C. 2013).

[43] According to *Profile of Legal Malpractice Claims, 2008–2012*, A.B.A. Standing Committee on Lawyers' Professional Liability (Sept. 2012), at 5., the top five areas in which malpractice cases were filed between 2008 and 2011 were real estate (approx. 20%), personal injury (approx. 15%), family law (approx. 12%), trust and estate (approx. 11.5%) and collection/bankruptcy (approx. 9%). As for immigration malpractice cases, in 2007, there were 187 of 40,486 cases (0.46%) and in 2011, 405 out of 52, 982 cases (0.76%) While the figures for immigration malpractice cases are minute, by comparison, those numbers offer no comfort to any immigration lawyer who has to defend against a malpractice claim.

[44] *See, e.g., AmBase Corp. v. Davis, Polk & Wardwell*, 8 N.Y.3d 428 (2007); *Arnav Industries Inc. v. Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300 (2001).

[45] *See, e.g., Hatfield v. Herz*, 109 F.Supp.2d 174, (S.D.N.Y. 2000) (dismissing malpractice claim from coop board member alleging numerous and distinct instances of incompetence which were refuted by lawyer's documentary evidence and where plaintiff offered no expert testimony supporting deviation from standard of care).

[46] *Suppiah v. Kalish*, 76 A.D. 3d 829, 832 (1st Dep't 2011) (in order to prevail, plaintiff would need to establish through expert that defendant had failed to perform in a professionally competent matter; burden shifts to defendant, then, to show through his expert opinion that he had not "perform[ed] below the ordinary reasonable skill and care possessed by the average member of the legal community.").

respect to the application for a new visa, the foreign national refused to travel to Sri Lanka to have the new visa validated, due to the political situation, and as a result, he was unable to maintain his legal immigration status. The foreign national then commenced a malpractice action against the lawyer.

After discovery, the lawyer moved for summary judgment based, in part, on the company's employment records that he claimed conclusively established that the plaintiff had been terminated by the company, not benched. In opposition, the employee submitted an affidavit from an expert in immigration law supporting the argument that the lawyer committed malpractice by failing to take the position that would have supported the extension of H-1B status. The expert also challenged the lawyer's contention that because the employee's passport had expired, under immigration regulations, the employee was precluded from seeking an extension of his visa status. In denying the summary judgment motion, the court noted that the issues in the case were "not part of an ordinary person's daily experience... with the byzantine world of immigration law."[47] The court found that even if immigration regulations were as inflexible as the lawyer had argued, it would have been necessary for the lawyer, through expert testimony, to support his claim that his hands were tied. The court reasoned that "the immigration regulations here, including the section requiring a valid passport at the time an application for an extension is filed, are hardly self-explanatory, nor is it possible to conclude from their face that [the lawyer] had no chance of successfully securing an extension of [the foreign national employee's] visa."[48]

In this case, the lawyer's failure to offer expert testimony was fatal to his motion for summary judgment. The case also supports the principle that competent representation in the area of immigration law, as in other practice areas, may require a different or creative interpretation of the law or regulation, especially when there is no binding policy or precedent decision. Competent representation requires knowledge of the current law, inspired thinking and sometimes the courage to push the envelope.

When Immigration Authorities Make Obvious Factual Errors Causing Denial of Claim for Relief: Use of Informal Remedies

When Legacy INS (INS) denied relief because it misread factual information provided in an adjustment of status petition, one lawyer decided to deal with it promptly on an informal basis, but her strategy proved unsuccessful. She was, however, able to defeat the malpractice action that ensued primarily because of her expert.[49]

Here, the lawyer had filed an adjustment of status application for a spouse who was present in the United States on a visitor's visa. At the interview of the couple, the adjudication officer raised some questions about the spouse's residence and her intention to come to the United States. Subsequently, the INS issued a letter denying the application on the ground that her client had a "preconceived intent to immigrate" when she had previously applied for a temporary visitor's visa and "therefore misrepresented a material fact to procure that visa." The denial letter invited the client to show why her employment authorization linked to the adjustment application should not be revoked. After reviewing the letter, the lawyer realized that the INS had misread the application and thus based its decision on erroneous facts. The lawyer decided based on her knowledge and experience to write back promptly to the INS to outline the factual errors, rather than filing a formal motion for reconsideration.[50]

About a month later, the lawyer received a form letter from the INS suggesting that she file a motion for reconsideration under immigration regulations that included payment of a filing fee. A few weeks later, the lawyer wrote to the INS requesting that her letter be treated as a motion for reconsideration and she enclosed the filing fee. Subsequently, the INS dismissed the "motion" as "untimely" and also revoked the client's

[47] *Id.*

[48] *Id.*

[49] *Liu v. Allen*, No. 03-CV-263 (D.C. Ct. of Appeals, argued Jan. 25, 2005–Mar. 16, 2006) (court found that although there were instances in which direct violation of a statute could constitute evidence of negligence, jury's finding that in this instance defendant's violation of 8 CFR §106.5(a) did not constitute negligence "was not so clearly against the weight of the evidence presented at trial").

[50] 8 CFR §106.5(a)(1) sets forth the procedures for filing a motion for consideration. Subsection (i) requires filing within 30 days of the decision at issue and subsection (a)(4) provides that a "motion that does not meet applicable shall be dismissed."

employment authorization. Because the clients were able to re-file the application, eventually they were able obtain their green cards.[51]

At that point, they filed the malpractice motion. Experts testified on both sides. The lawyer's expert supported the lawyer's reasoning that filing a motion for reconsideration was only one of a few different options for dealing with an obvious error in a decision and that an "informal approach is often more effective than a formal motion" because, among other things, "INS officers are willing and able to reverse adverse decisions on their own initiative, without a formal motion, when an obvious error is brought to their attention."[52] The client's expert disagreed, testifying, in essence, that the prevailing standard of care *requires* that a reasonably competent lawyer preserve a client's procedural rights even if there are other informal methods to persuade the INS to correct an obvious error. The court determined that the conflict "between qualified and competent experts on this central point was substantial enough to preclude a determination that [the lawyer] was negligent as a matter of law."[53]

In this case, the lawyer took a chance by relying on the informal letter while the time for filing a motion (within 30 days) was slipping by. Apparently, the jury agreed with her expert that it was reasonable for her to assume, based on what she knew about the decision making process, that dealing with the problem informally would best serve her clients. The jury may also have concluded that the INS was unreasonable. Here, the lawyer had a more than justifiable rationale for her conduct which was supported by an immigration expert. In contrast, a lawyer's out-and-out failure to file papers in accordance with immigration regulations or court-ordered deadline, where there is no practical alternative to or any reasonable justification for such failure, is more likely to result in a finding of malpractice.[54]

Risky Untested Strategies

A lawyer was retained by an undocumented married couple who had lived in the United States for some time and had two-children born in the United States. After the husband was detained and placed in removal proceedings, the lawyer advised the couple he could secure legal status by having them return to their home country, obtain citizenship for their older son, and have the son sponsor his parents for permanent residence. Both parents eventually travelled to their home country of Ecuador, where they were ultimately told they were subject to a ten-year bar on re-entry to the United States. They brought a malpractice action and were successful in proving liability and obtaining compensatory damages (basically, the lawyer's legal fee), as well as establishing that they had viable claims for punitive damages and emotional distress.[55]

The court found that based, in part, on the lawyer's advice to the couple that "his plan contained no risks and had a ninety-nine percent likelihood of success," they were entitled as a matter of law to seek emotional distress and punitive damages.[56]

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[51] The lawyer had offered to re-file the application free of charge, but the clients apparently had lost confidence in the lawyer, and decided to retain other counsel.

[52] *Liu v. Allen*, supra, at 49.

[53] *Id.*

[54] *See Jansz v. Meyers*, Slip Op. No. 109162/2009 (Sup. Ct. Apr. 8, 2010) (where lawyer conceded unjustified failure to file H-1B application timely to obtain an E-2 Visa designed to override the client's overstay status which was denied, client's motion for summary judgment on liability granted).

[55] *See Miranda v. Said*, Slip.Op. No.11-0552 (Sup. Ct. Iowa July 19, 2013) (malpractice liability established where expert testified that lawyer's strategy "had no chance of success," lawyer failed to produce documentary evidence to support his claim of prior success and lawyer's ultimate admission that no reasonable lawyer would use a certain form (I-601) to obtain lawful residency for the parents as issue).

[56] In *Said*, the court acknowledged that no Iowa decisions had made clear that compensation for mental distress was available, generally, in lawyer malpractice suits, the jury could so find, where a lawyer "reasonably should have foreseen" his negligence might have caused the clients significant emotional harm. The court also found that the lawyer's unjustifiable promises of success could provide a reasonably basis for imposition of punitive damages.

Special Areas of Concern

Excessive Caseloads

As discussed, even an experienced, knowledgeable and dedicated lawyer may be unable to render competent representation if he has an excessive caseload. When caseloads are excessive, lawyers may be spread too thin, unable able to devote the time and attention needed to competently represent their clients. Sometimes, they don't have time to even meet with their clients!

The same problem may occur for private sector solo immigration lawyers who maintain a low-cost high volume practice in order to serve the most vulnerable undocumented foreign nationals. It may apply to young associates in larger immigration firms which may not always afford the associates the time needed to obtain the knowledge and skill necessary for competent representation, or handle the matter with sufficient preparation and thoroughness. In such firms, a supervisory lawyer overseeing the work of other associates or non-lawyer staff who has too many cases may not be able to supervise competently as well. In all of those circumstances, the lawyer's failure to take steps to reduce his caseload so as to permit competent representation would likely result in a violation of Rule 1.1.

In the public sector, such as non-profits that provide immigration legal services, if a lawyer's workload prevents her from providing competent representation, the lawyer should not accept new clients. In addition, non-profits are often run by non-lawyer executive directors who hire new lawyers to replace others who handled a huge existing caseload. New lawyers hired to service these caseloads need to speak up to their superiors if the caseload is too great.

If the cases are being assigned by a court, the lawyer should request that the court make no new appointments to that lawyer in the first instance.[57] Sometimes after a case is assigned, it may turn out to require more time and preparation than the lawyer anticipated. If the lawyer determines he can no longer competently handle the case, he should seek to withdraw. If withdrawal is not permitted, the lawyer will have to make every effort to render competent representation. This might include asking a supervisor for relief by transferring work to others, for example.[58]

It is important for the lawyer to pursue the request for help as far as necessary within the organization's hierarchy. Under MR 5.1, a lawyer with supervisory authority over another lawyer is required to make reasonable efforts to make sure that the lawyer complies with the rules of professional conduct. The supervisor will be held responsible for the other lawyer's violation of a rule, if he fails to take steps to avoid or mitigate the consequences of such violation.[59]

Ineffective Assistance of Counsel Claims

Criminal and Immigration Cases

In the criminal context, incompetent representation may lead to a violation of the client's Sixth Amendment right to effective assistance of counsel.[60] But the elements of a lawyer's conduct which support an ineffective assistance of counsel claim (IAC), under applicable federal and state law in criminal matters, may not be the same as and, accordingly, may not amount to a violation of MR 1.1.[61] That same rationale applies to immigration

[57] *See ABA Formal Op.* 06-411 (May 6, 2006).

[58] *See Oregon Ethics Op.* 2007-178 (Sept. 2007) (lawyer must control caseload when representing criminal defendants whether as a sole practitioner or part of public defender agency); *Va. Ethics Op.* 1798 (Aug. 8, 2004) (prosecutor who practices with an excessive caseload impeding competency violates Rule 1.1 and supervising prosecutor assigning such a caseload violates Rule 5.1).

[59] *See* MR 5.1.

[60] *Strickland v. Washington*, 406 U.S. 668 (1984) (Sixth Amendment right to effective assistance of counsel is violated when defendant's counsel makes serious errors amounting to a deprivation of competent counsel which result in prejudice to the defendant).

[61] *See, e.g., In re Disciplinary Proceeding Against Longacre*, 122 P.3d 710 (Wash. 2005) (finding that lawyer rendered ineffective assistance in criminal matter was not dispositive of question of whether lawyer rendered incompetent representation under Rule 1.1 for purposes of discipline); *In re Wolfram*, 847 P.2d 94 (Ariz. 1993) (while IAC may be sufficient to trigger disciplinary inquiry it does not necessarily equate to a violation of ethical rules).

lawyers. As most immigration lawyers who handle deportation cases know, under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), a foreign national is also entitled to effective assistance of counsel, but on the basis of the Fifth Amendment due process right to a fundamentally fair hearing.[62] Under Lozada, a foreign national making an IAC claim in support of a motion to reopen is required to inform the former lawyer of any IAC allegations to allow her the opportunity to respond and also reflect "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not."

For that reason, many immigration lawyers may be exposed to the potential for discipline based on a violation of MR 1.1.[63] The nature of such IAC claims may be the lawyer's failure to advise the client of a hearing date resulting in an absentia order of removal, the failure to file court papers timely resulting in denial of a claim for relief, or the failure to adequately explain the ramifications of pursuing a particular strategy, among others. While a lawyer who is the subject of an IAC claim in a motion to reopen is not required to submit a response, she is ethically obligated to answer a disciplinary complaint and the failure to do so would be independent grounds for discipline. There may be times when the only way a lawyer can successfully defend against an accusation of IAC is to reveal client confidential information, which is permitted under one of the exceptions to the general proscription against revealing confidential information under MR 1.6. *For a fuller discussion of the circumstances under which a lawyer may reveal confidential information when defending against allegations of wrongdoing, see AILA Ethics Compendium, MR 1.6 Confidentiality of Information.*

Immigration Consequences of Criminal Convictions

One area of an IAC of which both criminal and immigration lawyers must be aware concerns a lawyer's advice to a defendant in a criminal matter as to the immigration consequences of taking a plea to a particular crime. This issue was addressed in *Padilla v. Kentucky,* 559 U.S. 356 (2010), where the Supreme Court held that a lawyer's failure to advise the client about whether his guilty plea would expose him to automatic deportation rose to the level of ineffective assistance warranting remand of his case. The defense lawyer in *Padilla* does not appear have been sanctioned by any disciplinary authority as a result of the IAC finding. After *Padilla*, a lawyer must research very carefully and thoroughly the question of whether a crime to which his client may plead is a deportable offense or risk not only a finding of IAC, but a finding of incompetence given the widespread knowledge of *Padilla*. It goes without saying that any immigration lawyer consulted by criminal counsel or who represents the client in the criminal matter himself must be equally sure that his advice is based on a sufficient understanding of the plea and the most thorough and timely research of applicable immigration law.

A recent case concerning a criminal lawyer who was found to have provided incorrect advice to his client about the immigration consequences of his plea demonstrates the heavy burden that may be imposed on a lawyer to provide competent advice.[64] In that case, the client had been charged with wire fraud and conspiracy to violate wire fraud. A conviction for either crime would have subjected the client to deportation. The client instructed his lawyer to negotiate a plea that would have no immigration consequences. The lawyer researched the law and advised his client that he had negotiated a plea to "misprison of a felony" which was not a deportable offense. This reflected the state of the law at the time of the plea (1999).[65] The client plead guilty, was not deported and traveled internationally on business for ten years without any problems. On his return to the United States from his last trip out of the country, immigration officials challenged his right to re-enter on grounds that misprison of a

[62] *See Matter of Assaad,* 23 I&N Dec. 553 (BIA 2003), even though the BIA acknowledged no constitutional right to counsel, it still affirmed *Matter of Lozada* as a right to a fundamentally fair hearing under the Fifth Amendment's Due Process clause, and IAC is a violation of due process. *See also Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007); *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Contreras v. Attorney General*, 665 F.3d 578 (3d Cir. 2012); *Denko v. INS*, 351 F.3d 717 (6th Cir. 2003); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855 (9th Cir. 2004); *Osei v. INS*, 305 F.3d 1205 (10th Cir. 2002); *Dakane v. United States AG*, 399 F.3d 1269 (11th Cir. 2004).

[63] It should be noted as well that 8 CFR §§1208.4(a)(5)(iii) and 208.4(a)(5)(iii) incorporate the *Lozada* standard. Under this rule which concerns asylum applications, a client who missed the one-year filing deadline because of the alleged action or inaction of an immigration practitioner and seeks permission to file it out of time (based on certain exceptions) is required file a complaint with the appropriate disciplinary authority or explain why none is being filed.

[64] *See Kovacs v. United States*, 744 F.3d 44 (2d Cir. 2014).

[65] *See Matter of Sloan*, 12 I&N Dec. 840 (A.G. 1968, BIA 1966) (determining that misprison of a felony was not a crime of moral turpitude).

felony was considered a crime of moral turpitude. Apparently, in 2006, the BIA had overruled its prior holding, concluding for the first time that misprison of a felony was a crime involving moral turpitude and, therefore, a deportable offence.[66] The client then pursued the extraordinary remedy of a writ of coram noblis seeking to vacate his criminal conviction on the basis that his lawyer rendered ineffective assistance of counsel when he advised him to plead guilty to misprison of a felony. The Second Circuit agreed.

Unfortunately, the Court did not explain or discuss why the lawyer's assistance to the client was ineffective in light of the state of the law at the time of the plea. Logic would suggest that the lawyer's reliance on the leading relevant case in advising his client was objectively reasonable. Yet the lawyer's assistance was deemed ineffective. As one commentator[67] noted, it may be that the criminal lawyer in the case wanted to help his client and not interpose any formal argument in his defense or that the government was more concerned with other ramifications of the change in the law than to fully litigate the matter. Nevertheless, the decision is troubling in that it does not establish a bright line concerning the scope of the lawyer's responsibilities in providing competent representation in this area.

For example, does this case hold that the lawyer had reason to foresee that the law might change and so advise his client? Should competent representation in matters affecting immigration status include a continuing duty to keep the client apprised of any change in the law that would affect his immigration status in the future? More specifically, would competent representation in this case require the lawyer to advise the client about the consequences of international travel if the law did change? Since it appears that the lawyer did everything he could do to provide accurate advice in that he carefully researched the law which supported his conclusion (and it appeared that the government agreed as well), it would be wrong to conclude that he was incompetent under MR 1.1 on the basis of a subsequent change in the law or even a finding that for purposes of the Sixth Amendment, his representation was ineffective. The ramifications of this decision remain to be seen.

Competence with Technology

As reflected in Comment 8 to Rule 1.1, a lawyer has a continuing duty of knowledge and skill in the area of technology, in particular, by keeping up with changes which affect the benefits and risks associated with the use of such technology.[68] The importance of maintaining competence in the area of technology cannot be overstated, not only as it affects the lawyer's ability to render competent representation, in general, but also as it relates to inadvertent disclosure of confidential information transmitted or stored electronically. For that reason MR 1.6(c), requires that the lawyer make "reasonable efforts" to prevent inadvertent disclosure or unauthorized access to confidential information. Comment 18 to MR 1.6 includes that the lawyer act "competently" citing MR 1.1.[69] Thus, a lawyer must have a basic understanding of how technology works and the risks of improper disclosure in order to be able to determine what efforts are reasonably necessary to safeguard confidential information in the first instance.[70] In other words, a lawyer must have knowledge and skill in the area of technology as it is used in the practice of law. Even when a lawyer has determined that the technological safeguards he has chosen meet the

[66] *Matter of Robles*, 24 I&N Dec. 22 (BIA 2006) (overruling holding in Sloan). Notably Robles was retroactively applied to non-citizens previously convicted of a imprison of a felony).

[67] *See* Cyrus Mehta, "The Insightful Immigration Blog", Mar. 9, 2014, Was the Attorney Really Ineffective in *Kovacs v. United States*?

[68] Comment 8 to Rule 1.1 provides that to "maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

[69] *See* Comment 18 to MR 1.6 makes specific reference to MR 1.1. It provides in part that MR 1.6(c) "requires a lawyer to act *competently* to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3." [Emphasis added].

[70] *Arizona Bar Op.* 05-04 (2005) (where use of electronic information is concerned, an attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish this purpose, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence).

"reasonable efforts" standard, he has a continuing duty, as technology advances and changes over time, to arrange for periodic review of the safeguards he has put into place.[71]

Special areas which may require a heightened degree of competence in technology concern the appropriate use of the "cloud" to store or transmit confidential information, the lawyer's obligations to prevent disclosure of confidential information in metadata; the lawyer's use of a web-site or participation in social media for marketing purposes, the lawyer's use of outsourcing and support services and reliance on other lawyers or non-lawyers to perform legal or support services. *An in-depth discussion of these areas of concern can be found in the AILA Ethics Compendium on MR 1.6.*

Regarding knowledge of substantive and procedural law, a lawyer who does not know how to use the Internet to conduct research or simply fails to do so is at risk of not providing competent representation.[72] This is so in part because of the generally known widespread use of the internet by courts and agencies.

Poor Client Communication and Competence: Internet and Interpreters

There may be circumstances in which a client is unable to interact with an immigration lawyer on an in-person basis and the lawyer still is able to provide competent legal services over the Internet. MR 1.1 does not prohibit such representation nor do any other rules of professional responsibility. But when in- person interaction is required, such as when a lawyer needs to meet the client to assess his credibility, gather information that may not be best disclosed in emails (or even old-fashion letters) or when the matter is very complex, a lawyer may not be able to render competent representation without meeting directly with the client.[73]

In the same way that communication with a client may be inadequate if confined solely to the Internet, a lawyer who cannot communicate with his client in the client's language will not be able to competently represent the client without becoming proficient in the client's language (if time permits) or using the services of a bilingual associate or an impartial interpreter who is prepared to honor the lawyer's ethical obligations as his own.[74] Many immigration lawyers find that family members or good friends may communicate better with the client than interpreters hired through an agency, but prudent and conscientious lawyers should be wary of so-called paid agents or advisors brought in by the client to act as interpreters as they may not be objective and in some cases may be dishonest. A prudent and conscientious lawyer should make every effort to insure the accuracy of the interpreter by assessing his competency on a case by case basis. An interpreter must be made to understand that he must comply with the lawyer's duty of confidentiality required under Rule 1.6.[75]

Pro Bono Work

Immigration lawyers, as well as non-immigration lawyers, who provide pro bono services, are subject to the same standard of care as lawyers who provide legal services for paying clients. When lawyers provide pro bono services outside their area of knowledge and experience, individual competence and proper supervision go hand in hand. Law firms that encourage pro bono immigration work have a special responsibility to ensure that their pro

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[71] *Arizona Bar Op.* 09-04 (2009) (in accessing the permissibility of installing an encrypted online file storage and retrieval system for clients, the Committee cited lawyer's ongoing responsibility to keep up with technological advances as another measure of competence).

[72] Margolis, *Surfin' Safari-Why Competent Lawyers Should Research on the Web*, 10 Yale J.L & tech. 82 (2007) (noting that as of 2008 there were no reported cases finding a failure of competence based on research alone, the failure of competent research is often associated with other problems).

[73] *See Florida Bar Ethics Op*. 00-4 (July 15, 2000) ("if the client's situation is too complex to be easily handled over the Internet, [the lawyer] must so inform the client. If the client is then unwilling to meet in person with [the lawyer], [the lawyer] must decline the representation or, if the representation has already begun, to withdraw").

[74] *See New Hampshire Ethics Op*. 2009/10-2 (the requirements of rendering competent representation which include the obligation to gather facts regarding the client's problem and to develop a strategy with the client require that the lawyer and client be able to exchange information and understand one another); *New York City Bar Ethics Op.* 1995-12 (July 6, 1995) (when need for interpreter is required for effective communication, failure to take affirmative steps to secure one may breach duty of competence and should not be left to client's discretion).

[75] *See AILA* Ethics Compendium on MR 1.6 at pp. 5-1.

bono lawyers provide competent representation. According to one commentator,[76] this may be achieved, among other things, by:

In-house training sessions

Reimbursing the lawyers for attending CLE and workshops on immigration law

Providing resources for the lawyers, *e.g.*, training manuals, videos, and access to educational and training materials provided by bar associations, such as AILA.

Providing models of standardized forms

Providing access to mentors

Because supervisors are liable for any ethical violations of their supervisees, supervisors should be sure to have knowledgeable and experienced immigration lawyers conduct periodic case reviews of *pro bono* cases.[77] Consideration of a *pro bono* lawyer's overall workload is also very important as immigration cases can be very time consuming.

Limiting Scope of Representation

There are circumstances in which comprehensive legal representation in complex matters may be impractical for a lawyer who may not be competent in every aspect of the matter, or for the client who does not have the ability to pay the fee. As a result, the lawyer and client may agree to limit the lawyer's services to just one area of the matter as noted in Comment 7 to MR 1.1 which references MR 1.2.[78] MR 1.2 permits a lawyer to reasonably limit the scope of the representation with the client's informed consent.[79]

Limiting the scope of representation, which is also known as "unbundling," might include drafting only a complaint or brief for a *pro se* client, counseling a client through a particular action without filing a notice of appearance or advising a small business about a certain legal procedure.[80] By agreeing with the client to limit the representation, the lawyer is able to limit his practical and ethical obligations, but she would still be required to employ the same thoroughness in identifying the legal issues in the case as a whole. If the lawyer concludes that the client has a legal issue that concerns a matter outside the scope of the representation, competent representation would include: (1) advising the client of the problem, (2) that under the unbundling agreement the lawyer is not representing the client as to that problem and (3) that the client should consult with other independent counsel.[81] For this reason, a prudent and conscientious lawyer should consider whether unbundling is appropriate in the first instance.[82] Finally, since MR 1.2 requires that an agreement to limit the scope of the representation must be with the client's "informed consent" the agreement should be in writing even where written retainer agreements (or other writings) are not required.[83]

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[76] *See, e.g.*, Suzan Kern, "Supervision and Competence in Pro Bono Immigration Representation", *AILA Immigration Practice Pointers* 109 (2010–11 ed.).

[77] As discussed, under MR 5.1 and MR 5.3, supervisory lawyers may be liable for violations of ethical rules by their supervisees. *See e.g. Mays v. Neal*, 938 S.W.2d 830 (Ark. 1997) (while a lawyer may delegate certain tasks to his assistants, as supervising lawyer he has the ultimate responsibility for compliance by non-lawyers with applicable provisions of the model rules).

[78] Comment 7 to MR 1.1 states that "required attention and preparation [necessary for competent representation] are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. *See* Rule 1.2(c)."

[79] MR 1.2 provides that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."

[80] *See Wash. DC Ethics Opinion* 330 (July 2005) (comprehensive discussion on the various ethical rules applicable to unbundling arrangement which includes MR 1.1 along with MR's 1.2 (scope), 1.3 (diligence), 1.4, 1.6, 1.7, and 1.9.

[81] *Id.*

[82] *Id.*

[83] *Id.*

A lawyer who agrees to provide limited representation to a *pro se* litigant may need to consider whether in the jurisdiction in which he practices he is ethically obligated to inform the tribunal, notwithstanding an *ABA Formal Bar Opinion* 07-446 which concludes that a lawyer does not have to disclose the assistance.[84]

In the immigration field, a client's first interaction with an immigration lawyer is through a consultation. During such a consultation the lawyer must make clear to the client that the representation is limited to brief advice. If the client has to file a motion to reopen before a deadline, the lawyer should make clear to the client that he should not assume that the lawyer will undertake such representation beyond a consultation.

Immigration lawyers may also limit representation to a particular matter, such as the lawyer who represents both the employer and employee will limit the representation of the employee to the obtaining of the H-1B visa. If the employee chooses to apply for permanent residency options through other means, the lawyer who also represents the company should make clear that her representation is limited to the H-1B visa and does not extend to obtaining permanent residency outside of such employment. Best practice would be for this limitation to be memorialized in a retainer agreement, letter of engagement or consent to dual representation.

A business immigration lawyer should also make clear that her representation is limited to the business immigration matter, and she will not be able to advise on claims or benefits that might be available outside her area of expertise, such as an asylum claim. Likewise, a lawyer specializing in removal should also similarly limit the representation, and should advise the client to consult with an immigration lawyer specializing in business immigration should the client be able to claim a potentially different benefit parallel to the relief being claimed in removal proceedings. As above, consent to the limitation ought to be in writing.

Ideally, an immigration lawyer should be equipped to at least spot all the issues for the client, even though he may not be able to undertake the representation.

Attaining Competence: Resources for Immigration Lawyers[85]

AILA Education presents in-person conferences, live webcasts, live audio and web seminars, and OnDemand programs throughout the year on a variety of important and topical immigration issues. *agora.aila.org*

AILA Publications include an extensive line of "how-to" manuals, multimedia toolboxes, comprehensive sourcebooks, an online library, primary source material, and more. *agora.aila.org*

AILA's peer-to-peer **Mentor Directory** is a network of experienced practitioners who have agreed to answer questions and aid other members in specific areas of immigration law and practice. *www.aila.org/mentors*

The **New Member Division** is open to AILA members in their first three years of AILA membership or until they reach 36 years of age, whichever occurs later. The NMD offers a variety of professional tools and social opportunities to build your immigration practice and your career. *www.aila.org/nmd*

AILA Message Center is a tool for members to engage in professional dialogue on issues relevant to the immigration law profession. The Message Center includes over 50 topical forums to ask questions and share ideas with other members. *messages.aila.org*

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[84] *ABA Formal Ethics Op.* 07-446 concludes that a "lawyer may provide legal assistance to litigants appearing before tribunals "pro se" and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance." *See also In re Fengling Liu*, Docket No. 09-90006-am (2d Cir. Nov. 22, 2011) (concluding discipline for failure to disclose ghostwriting not basis for discipline). But as noted in the *Pennsylvania and Philadelphia Bar Associations Joint Ethics Opinion* 2011-10 addressing limited scope engagements, courts and ethics opinions have reached different conclusions, citing to 29 bar association opinions in which 11 concluded disclosure not required and 18 concluded it was required.

[85] In addition to the many resources provided by AILA listed below, in many large cities, state and local bar associations offer continuing legal education and training programs for the novice and experienced immigration lawyers. In addition, many non-profit legal services providers, including those that are "accredited" by the DHS provide special training sessions for lawyers who are willing to handle pro bono cases.

D. Hypotheticals

As we have discussed, in the vast majority of published disciplinary cases against immigration lawyers, the lawyer either engaged in a pattern of incompetent representation and/or committed other violations of the rules as well. Research of published decisions has not revealed any instances in which a lawyer was censured, suspended or disbarred on the basis of incompetence alone. While it may be that a single act of incompetence committed by an immigration lawyer may only result in informal discipline or a "pass", there is no such thing as a "free pass" and a prudent and conscientious immigration lawyer would certainly want to avoid any accusation that his representation was incompetent. For that reason, the hypotheticals below present real world issues for immigration lawyers that we believe could result in some form of discipline.

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: Naturalization: Asking More Questions

A new client, Abdi, retains a lawyer to handle his naturalization. Originally from Somalia he entered the United States as a refugee with his parents and siblings when he was a teenager. He applied for permanent residence one year after being admitted. The date of his adjustment is recorded on his permanent resident card as the date he entered as a refugee. He appears to have a straightforward case for naturalization. Abdi has been a permanent resident for more than five years, and meets the other eligibility requirements, since he is over 18 years old, has not left the United States since he arrived, and has no criminal record. He requests a name change on his N-400 application, which is an accepted part of the naturalization process. However the new name he has chosen, "Samatar," is very different from his current one. He also changes his date of birth on the application to a date that would make him about two years older to fix what he describes as a mistake on his permanent resident card. The lawyer makes the changes he has requested. At the N-400 interview, the immigration officer issues a request for evidence that requires him to undergo DNA testing with his mother to establish his parentage. Based on the test results, which do not establish a match, the officer denies the application. Instead of becoming a citizen, Abdi is placed in removal proceedings with an allegation of fraud regarding his initial admission as a refugee.

This scenario presents a competency question that involves the degree of preparation and thoroughness reasonably necessary in what appears to be a straightforward case.

Analysis

Did the Lawyer's Representation Amount to Incompetency Under MR 1.1? Most Likely, Yes.

We begin with a consideration of the four components of competency under MR 1.1, with the understanding that it is not always easy to isolate them. However, the facts demonstrate that the lawyer, here, had the requisite knowledge of the criteria necessary for naturalization and there is nothing to suggest she lacked the skill necessary for handling a naturalization application. Was there anything, here, that the lawyer should have done to protect Abdi? If so, does his failure to take such steps amount to a violation of MR 1.1?

Yes, because the lawyer did not demonstrate the preparation and thoroughness reasonably necessary under the circumstances. Here, the lawyer was presented with red flags that should have at least caused her to question Abdi further about his change of birth date and why he was selecting a new name that bore no relation to the name Abdi. While it is not unusual that a naturalization applicant may need to correct mistakes in prior applications or elect to change his name at the time of the application, here the changes made by Abdi, taken together, should have triggered a further inquiry by the lawyer.

A well-prepared and thorough lawyer would need to press his client about facts, which might create a problem about his identity. Given the red flags here, the lawyer would have needed to prepare his client for the

fact that USCIS might open the matter to further investigation, which might include DNA testing, and that his N-400 application could jeopardize his permanent resident status. That advice would have also included the downside of maintaining the legal resident status only without applying for citizenship. A prudent and conscientious lawyer also would have considered memorializing his advice in the event that the client was determined to take his chances and go forward with the process.

Notwithstanding the lawyer's lack of preparation and thoroughness in fleshing out the red flags, which would amount to a violation of MR 1.1, it is difficult to predict if the lawyer would be subject to discipline. And it is doubtful that Abdi would be able to establish malpractice under the scenario's facts. A client who engaged in fraud and conceals it from his lawyer does not have clean hands.

Hypothetical Two: Asylum-Pro Bono: When to Ask for Help?

A lawyer without previous immigration law experience, and a busy practice, agrees to provide pro bono representation for an asylum applicant named Daniel. The lawyer works through an established legal services organization that completes the initial intake to assess the client's eligibility, assigns an experienced consulting lawyer for the pro bono lawyer to use as a resource, and provides basic materials on asylum law issues, including the one-year filing deadline. The organization offers a day-long training seminar for volunteer lawyers, but the next seminar will be held in two months. The lawyer contacts the consulting lawyer, but she seems impatient with his questions, and the lawyer decides not to bother her again. Daniel entered as a visitor about ten months earlier, and therefore must file in two months. While the lawyer is aware of the filing deadline, two months seems like more than enough time at the outset of the case to complete the initial filing. However, at the first meeting with Daniel, the lawyer's basic questions about his experiences cause him severe distress. The lawyer schedules several meetings with Daniel over an extended period to get the information he needs, and the process takes much longer than expected. The lawyer has severely underestimated the time needed to prepare the application. Because he expected to be done much sooner, he did not calendar the one-year filing deadline. As a result, the lawyer missed the filing deadline, and Daniel's asylum application was not approved; he is placed in removal proceedings.

This scenario presents a competency question involving an inexperienced lawyer's lack of preparation and lack of appropriate supervision reasonably necessary in the context of a pro bono immigration representation.

Analysis

Does the Lawyer's Failure to Meet the One-Year Filing Deadline for His Client's Asylum Application Amount to a Violation of MR 1.1? Does the Supervisor of the Legal Services Organization Bear Any Responsibility for the Lawyer's Failure to File Timely Under the Rules?

Since the lawyer was provided with the basics of filing an asylum application prior to the representation, which included the requirement that the application be filed within one-year of the client's U.S. entry, his failure to file timely because he had failed to calendar the date and, therefore, lost track of time, amounts to a lack of preparation, one of the components of competency. The lawyer was provided with sufficient information about the filing due date and the need to comply with it, but he did not use a proper tickler system, which would not only have reminded him of the due date, but likely would have caused him to advise the client of the impending date and the consequences of filing out of time.

The lawyer also did not make sufficient efforts to speak with the consulting lawyer about how to deal with a difficult client. His failure to do so suggests that he did not take proper steps to obtain knowledge as well. The fact that the consulting lawyer seemed impatient does not justify the lawyer's decision not to "bother" her further. In any event, even if the consulting lawyer had explicitly refused to assist him, the need for adequate preparation would have required the lawyer to contact the supervisor of the legal organization for direct help or to provide another consultant.

Considering the totality of the lawyer's handling of the case, his failure to file timely arose from a lack of preparation (and perhaps, thoroughness and knowledge) amounting to a violation of competency under MR 1.1.

In addition, if the duties of the "consultant" were deemed supervisory (which is not clear), the consultant might be deemed responsible for the lawyer's incompetency under MR 5.1(b). Further, the supervisor of the legal services organization might be deemed responsible for lawyer's incompetency under MR 5.1(a). From the facts in the scenario, it does not appear that the lawyer's work was being reviewed on a regular basis, the lawyer was assigned a case before participating in a training program and it does not appear that the role of the consulting lawyer was sufficiently defined.

Hypothetical Three: Employment-Based Permanent Residence: Never Assume

A lawyer, who handles employment-based residency matters on a regular basis, represents a U.S. company and its H-1B employee, Rakesh, in filing a labor certification application as the initial step for his employment-based permanent residence. The lawyer knows that H-1B employees are subject to a maximum eligible stay of six years, and that Rakesh has entered his sixth year of H-1B status. There is an exception available to the six-year limit if the employee is at a certain stage of the employment-based application for permanent residence. To qualify for this exception, Rakesh needs an approved labor certification and an approved I-140 immigrant petition. Knowing that time is of the essence, the lawyer prepares the labor certification job description duties and minimum requirements based on the company's general job description. After the company completes three months of advertising, she files the labor certification application online with the Department of Labor, and after seven months, the DOL approves the application. With the original approved labor certification, the lawyer plans to file the I-140 petition with a premium-processing request for a decision within 15 calendar days. However, when preparing to file the I-140 immigrant petition, she discovers that Rakesh is unable to demonstrate that he had the required minimum experience for the offered position on the labor certification application when he started work at the company. As a result, the company is unable to file the I-140 petition based on the approved labor certification. Rakesh reaches the six-year H-1B limit, forcing the company to terminate his employment and requiring Rakesh and his family to leave the country.

This scenario presents a competency question involving a lack of adequate thoroughness by an experienced lawyer. Because the issue of the employee's experience was not established at the outset of the labor certification process, the lawyer wasted time and expense on a matter that turned out to have been futile and with serious consequences.

Analysis

Did the Lawyer's Failure to Determine Timely Whether or Not the Employee Had Sufficient Work Experience for the Offered Position Amount to a Violation of MR 1.1?

Maybe. Here the lawyer had sufficient knowledge of the steps necessary to obtain an approved labor certification and I-140 immigration petition, which would permit the employee to stay in the United States beyond the six-year limit of his H-1B. She also was familiar enough with the processing times for obtaining the approved labor certification and to file the I-140 with a premium-processing request to take advantage of the exception to the six-year limit for H1-B status. She also presumably knew that the employee required minimum experience.

Nevertheless, the lawyer missed getting the needed experience information. The scenario does not explain why. There are several possibilities. Perhaps, the lawyer was under pressure to file the application right away because the company was eager to continue the employment and the lawyer assumed the employee could demonstrate that he had the required experience. Perhaps the lawyer asked the employee if he had the requisite experience and the employee assured her he did and not to worry about it. Perhaps the lawyer asked the employee for a verified experience letter and the employee needed more time to get it promising he would have it by the time the labor certification was approved. Perhaps the employee provided the letter when promised, but upon review, the lawyer learned that the employee was wrong in claiming he had the requisite experience.

An immigration lawyer ought not to "assume" anything. She should not rely solely on the client's word or promise to provide evidence of the requirement. Recognizing that there is a fine line between circumstances in which a lawyer may reasonably trust a client to provide accurate information and those in which he may not, a lawyer should be mindful of being thorough. Here, that meant obtaining documentary evidence that the employee had the requisite experience before filing the labor certification application in the first place. Whether or not the failure to do so—while certainly not best practice— would amount to a violation MR 1.1, warranting discipline, is hard to predict.

Hypothetical Four: Marriage-Based Permanent Residence: Taking Your Client's Word

A married couple, Joe and Juana, come to a lawyer's office for help applying for Juana's permanent residency based on their marriage. Joe is a lawful permanent resident. Juana is from Mexico. She does not qualify to adjust her status in the United States because her last entry was without inspection and she has no underlying petition to qualify her for a §245(i) adjustment. After thinking it over, the lawyer tells them that Juana qualifies for residency, but she will have to leave the United States to attend her consular interview abroad. This will trigger a consequence: she will be deemed inadmissible under INA §212(a)(9)(B) and be barred for 10 years from returning. However, because Joe is a lawful permanent resident, Juana would be able to submit an I-601 waiver for unlawful presence that allows a waiver of the 10-year bar. The lawyer also advises the couple of a potential alternative, the filing of a provisional waiver under an I-601A, if Joe became a citizen. But because Joe does not speak English, he does not want to apply for naturalization.

The lawyer asks Juana if she has left the United States at any time after she entered the country or if she has ever been ordered removed. Juana tells the lawyer that she first entered the United States on a border crossing card in B-2 status in March 1996, left in March 1997, and then returned in April 1998. April 1998 was also her last entry. Immigration officials refused her application for admission when she was entering the last time, detained her for two hours, and then sent her back to Mexico. She made a successful entry (without permission or inspection) the next day.

The lawyer tells Juana that the dates are important as they affect her ability to qualify for residency under a change in the law. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) went into effect in April 1997 and created the concept of "unlawful presence." If she was unlawfully present for one year after April 1997 or if she had a removal order and then left the United States and returned to the United States without inspection, she would trigger grounds of inadmissibility found at INA §212(a)(9)(C) and would not be eligible for a waiver until she had spent 10 years outside the United States.

The question of whether Juana left under an expedited removal order after her last entry is also critical. If she returned to the United States without inspection after deportation, she would be subject to the grounds of inadmissibility found at INA §212(a)(9)(C) and would not be eligible for a waiver until she had spent 10 years outside the United States, irrespective of the date of the removal order. Accordingly, the lawyer tells Juana that her case was only viable if the dates she gave the lawyer were accurate and if she had not been deported at the border.

Juana tells the lawyer that she is absolutely certain of the dates because the reason she returned to Mexico was to attend to her ailing father, who died in summer 1997. The lawyer asks again if she had been deported. Juana repeats that she is confident there was a voluntary departure and no deportation because that is what the border official told her.

On that basis, the lawyer files the I-130 petition, which is approved. The lawyer submits all of the visa application documents to the National Visa Center and an appointment for Juana is made at the U.S. Embassy in Ciudad Juarez. At the embassy, the consular official denies her application. Apparently, Juana had her facts wrong. When she was detained in April 1998 by border officials, she was deported.

> Immigration records showed that she was subject to expedited removal on the date she was detained. That means that when Juana entered subsequently without inspection, she triggered grounds of inadmissibility under INA §212(a)(9)(C). As a consequence, Juana was unable to apply for a waiver of the grounds of inadmissibility for 10 years.

As in Hypothetical Three, this scenario presents a competency question involving a lack of adequate thoroughness by an experienced and knowledgeable lawyer. Did the lawyer's failure to seek verification of the dates and the deportation question amount to a lack of thoroughness and preparation?

Analysis

There are ample facts in this scenario demonstrating that the lawyer had the requisite knowledge of the law and procedures involved in addressing the problem of entry without inspection and no petition to qualify under a §245(i) adjustment. She understood the relevant law and was able to explain it to Juana. She was clear in explaining how important it was to provide the correct dates and to be sure that Juana had not been deported. In such cases, best practice would have required the lawyer to file a FOIA request to Customs and Border Protection to obtain the client's immigration history, which would include the exact date she was apprehended by border officials and details about whether this was a voluntary departure or an expedited removal. However, FOIA requests can take up to a year and it is understandable that the client was eager to start the process. Since she was out of status, there was always the possibility that she could be arrested and detained. Perhaps, for these reasons, the lawyer agreed to go forward without a FOIA request. In such cases, best practice would suggest that the lawyer memorialize the advice she gave to the client along with the client's consent to the risks if the information was wrong. As a practical matter, asking the client to sign off in writing that she had been so advised might have caused her to have second thoughts. She might have decided to wait for the results of the FOIA.

Although it ended badly for the client, it is a close question as to whether or not the lawyer's lack of thoroughness in not verifying the client's information through a FOIA request amounts to incompetency under MR 1.1. Juana's assertions as to the dates were supported by reasonable reminders, such as the client's father's illness, and the lawyer made clear how crucial the dates were. Juana seemed equally certain she was told by the border officer that she was not being deported when she was sent back. However, given that there were two potential serious consequences to Juana's case if she was wrong about the dates or the deportation issue, the safest course for the lawyer—and certainly best practice—would have been to file a FOIA request. However, it is clear that the lawyer understood the importance of obtaining correct information. She went over the facts a second time with her client. She made a judgment to trust her client's memory. Under those circumstances, it is not likely that the lawyer would be found to have been incompetent because she failed to file a FOIA request. Whether a particular jurisdiction might take a harsher stand cannot be determined.

Hypothetical Five: Marriage-Based Permanent Residence: What's the Story?

Jim, the President of ABC Corp, a long-time client, asks the lawyer if he would be able to assist Flora in filing for permanent residence based on her recent marriage to his brother John. While the lawyer regularly handles employment-based immigration matters for ABC, he does not have experience with family-based applications. Still, he meets with Flora and John and agrees to take their case because of his ongoing work with ABC and Jim's influential position with that company. The lawyer learns that Flora had previously filed for permanent residence based on her first marriage, but when that marriage ended badly, she did not pursue the application. The lawyer files a one-step application, an I-130 (petition for alien relative) and the I-485 (adjustment of status) for John and Flora, and their case is processed through the interview. When Flora appears with John at her adjustment interview, she learns that she is subject to removal. Apparently, her previous I-485 application based on her first marriage was denied without her knowledge. As a result, she was placed in removal proceedings, and she was issued an in absentia removal order because of her failure to appear for her initial master calendar hearing. Because Flora already had a final order of removal when the lawyer agreed to file the marriage-based application on her behalf, his submission led directly to her arrest and deportation.

This scenario presents a competency question involving a number of the components for an otherwise experienced immigration lawyer.

Analysis

Although the lawyer is not experienced in handling family-based residency applications, he appears to have at least a basic knowledge of the substantive requirements and procedures to handle the application for John and Flora. He even knew that in order to save time, a lawyer may file both the I-130 and the I-485 together.

But it is not clear that he knew the importance of gathering as much information as possible about Flora's immigration history, when presented with some information about it. Perhaps he was not familiar enough with the various scenarios that can arise from an application that has been filed, but not pursued. Perhaps, he was so eager to please Jim to insure continued employment work; he did not act with the requisite thoroughness and preparation reasonably necessary for this matter.

Once the lawyer learned from Flora that she had previously filed for permanent residence, he was on notice that she was in the system. He should have anticipated possible adverse consequences for Flora. Flora may not have been telling the truth when she claimed she decided not to pursue the prior application. The lawyer could have obtained the needed immigration history through a FOIA request, or if Flora was able to locate her "A" number, the lawyer could have called the EOIR case information system to find out whether Flora had been placed in removal proceedings.

An immigration lawyer handling a matter in which there have been prior proceedings should *always* obtain the client's immigration history. Here, the lawyer was made aware that a prior matter was not pursued but he was not advised about the outcome. He did not question the client further. He apparently did not even consider filing a FOIA request. Under those circumstances, his failure to do so, would more likely be deemed a lack of thoroughness, triggering a finding of incompetence

Hypothetical Six: Multiple Immigration Practices Areas: Can You Do It All?

Fresh from a bar sponsored seminar on family-based residency applications, including those based on marriage, a lawyer agrees to represent a newly married couple. The lawyer has taken the course because he wants to concentrate on building a practice focusing primarily on family based applications. He is not really interested or experienced in trial work.

As for the couple, Mary is a U.S. citizen and Jose is from Mexico. They have asked the lawyer to "fix up the papers" so Jose can get a work permit and be legal in the United States. The lawyer files Form I-130 and Form I-485. He immediately receives a Request for Evidence (RFE) from the USCIS asking for proof of admission by Jose into the United States. The lawyer discusses the matter with Jose and obtains affidavits from two people who came into the United States with Jose.

The lawyer files the affidavits in answer to the RFE. The Form I-130 petition is approved but the I-765 application for employment authorization and Form I-485 application for adjustment of status are denied and Jose is served with a Notice to Appear (NTA) alleging that he is in the United States. without permission. The lawyer tells the couple that he does not do removal work, but will represent them if they want.

This scenario presents the issue of competency where a lawyer lacks knowledge and experience in representing clients in removal proceedings.

Analysis

Can the Lawyer Provide Competent Representation Under These Circumstances?

Here the lawyer has demonstrated that he understands that he must have sufficient knowledge of the law and procedures needed to pursue a particular avenue of immigration relief as well as the attendant legal skills. He may obtain knowledge and skill through study and he appears to have attempted to do so by attending the bar sponsored seminar. He even attempted to be thorough by responding timely to the USCIS's RFE as to Jose's proof of admission. Unfortunately, the lawyer was not aware that proof of admission is an essential prerequisite to filing for adjustment of status in the United States under INA §245(a). This is what the lawyer should have inquired about at the very outset, but certainly before responding to the RFE. Had he inquired, he also might have learned that in some situations, a "waive through admission may also count as an admission" for purposes of adjustment eligibility under §245(a). Under a "waive through" admission (such as where the foreign national is in a car with others that passes through the border checkpoint), affidavits may be the only way to prove the admission. However, it is key that the lawyer ought to have thought about the admission issue at the very outset. The lawyer's failure to do so suggests that the bar association seminar may not have been enough to provide the requisite knowledge. This is a situation where the lawyer *did not know what he did not know*.

As to the removal case, since the lawyer apparently knows he lacks knowledge and skill in the area of removal proceedings, in part, because he "does not do removal work," the lawyer must decide if he would be able to attain competency in removal proceedings. Is it reasonable for the lawyer to expect that he can gain sufficient knowledge and skill in handling removal proceedings through study in time to represent Jose in removal proceedings?

Most likely, no. This is so because removal proceedings not only require an in-depth knowledge of the applicable law—namely the defenses, they require, among other things, good trial skills, document preparation skills including obtaining needed translations, good research skills, knowledge of local procedurals rules and actual practices and, sometimes, even familiarity with the immigration judges. These are components that require time and experience and are not likely to be learned sufficiently by attendance at one bar sponsored seminar. Here, association with another lawyer with knowledge and experience in removal cases would be required, if the lawyer did not want to refer the case out altogether. Even if his clients were willing to let the lawyer handle the case solo, their approval would not excuse incompetent representation from an ethical perspective and probably not excuse it in a malpractice case. The lawyer is in a better position than his clients to determine if he is competent.

Hypothetical Seven: Temporary Protected Status: Look Before You Leap

A lawyer who devotes 30 percent of his practice to immigration matters (mostly removal cases) takes on a Temporary Protected Status (TPS) matter for a client from Honduras. The client came into the United States on December 29, 2001 with a B-2 visa with authorization to remain for six months (ends June 28, 2002) and has been in the United States ever since. The client has not been involved in any criminal matters at all. The client is tired of being in the shadows so the client goes to the lawyer for a solution. The lawyer files for TPS for the client, but it is denied because in order to be eligible the foreign national must have entered the United States prior to the year 2000. Undeterred, the lawyer then files for INA §240A(b), Cancellation of Removal and Adjustment of Status with USCIS, even though it can only be filed with an Immigration Judge in removal proceedings. USCIS denies the application for lack of jurisdiction, and then serves the client with an NTA. The lawyer did not realize that cancellation of removal is only available if the applicant is under the jurisdiction of immigration court. The lawyer represents the client at the removal hearing and re-files the §240A(b) request with the immigration judge. The application is denied again because it turns out that the client has no qualifying relatives under §240A(b)(1)(D). The client was then ordered removed.

This is another scenario presenting the issue of competency where a lawyer has experience in one area of immigration law, but undertakes representation in an area where he lacks knowledge and compounds the problem by mistakes that arise from lack of knowledge, preparation and thoroughness.

Analysis

Does the Lawyer's Representation Here Amount to Incompetence in Violation of MR 1.1?

Most certainly, yes! In the first instance the lawyer filed for TPS for the client without knowing the eligibility requirements. In particular, the client had entered the country two years too late to quality for TPS. Since it would be easy enough to learn the requirements for TPS by just reading the rule, the lawyer's failure to obtain sufficient knowledge was fatal to the application. The lawyer exacerbated his incompetency by filing for cancellation of removal with USCIS, notwithstanding that any lawyer experienced in removal cases would know the proper forum. His filing with the USCIS demonstrates a lack of preparation and thoroughness, as well as knowledge, in that it again would have been easy enough to determine the proper forum. Perhaps, his being embarrassed by his first error and desire to take prompt action to divert his client's attention to the first error clouded the lawyer's skills. Whatever his motivation, the lawyer acted without competence.

Even more egregious than his filing a TPS application for someone not qualified, the lawyer acted without sufficient knowledge when he re-filed the application for cancellation of removal without determining in the first instance if his client had qualifying relatives as is required. The lawyer could easily have obtained the appropriate knowledge by simply reading the rule.

Under these circumstances, it is likely that the lawyer would be disciplined for lack of competency under MR 1.1. He also ought to return any fee paid by the client since they were unearned.

Hypothetical Eight: Be Careful What You Promise: Documentation

A lawyer regularly induces clients to engage his services by referring to his track record of success. In a particular family based case, the applicant received a request for evidence because the marriage certificate she presented of an overseas marriage was not under seal. Because the clients could not obtain a seal within the time period involved, the lawyer, attempting to live up to his prediction of success, "traced" a seal from another marriage certificate and submitted the changed certificate to USCIS.

This scenario presents the problem of promising too much and the trap of trying to make things right through deception. Obviously, the lawyer's fabricating a seal is dishonest conduct in violation of MR 8.4(c), but it is not

clear whether the submission of a marriage certificate without a seal rises to the level of incompetency under MR 1.1.

Analysis

Based on the scenario, the failure to obtain a properly "sealed" marriage certificate does not appear to be fault of the lawyer. Sometimes it does take a long time to obtain necessary documents and the clients do not want to wait or cannot wait. It is precisely for that reason that the immigration authorities request further evidence, which gives the applicant the opportunity to cure an evidentiary problem.

But here, because the lawyer presumably had promised a certain outcome he had a lapse of judgment (putting in mildly) and sealed his fate (pun intended) by engaging in dishonest conduct, which is significantly more egregious than any finding of incompetence based on submission of the unsealed marriage certificate.

Hypothetical Nine: Withholding of Removal and Marriage-Based Residency Application: One Mistake After Another

A client comes into a lawyer's office and says that he has been granted something called withholding of removal on January 12, 2013. He says that he is from Iran and cannot go back because of religious and political reasons. He wants a green card and says that he has recently married a United States citizen. Believing that the client's matter involved a straight forward family-based residence application, the lawyer files an I-130 relative petition and I-485 application for adjustment of status for the client on February 8, 2013. The I-485 petition is denied due to lack of eligibility. The lawyer tells the client that the USCIS made a mistake and offers to file an appeal, but instead files a motion to reconsider under 8 CFR §103.5(a)(1)(i) within the appropriate time period, arguing that the client is eligible for adjustment since he satisfies the requirement of legal entry in 2012 with a valid B-2 visa. That motion is also denied on August 16, 2013.

The lawyer then does research as to why the motion may have been denied and discovers correctly that his client was never eligible to file an I-485 in the first place because he was granted withholding of removal, which by its terms represents a finding that the foreign national would have been removed "but for" the conditions in his home country. The only way the lawyer would have been able to help the client would have been to find grounds to support a motion to reopen the prior proceedings in which it was determined that the client was to be removed. The basis for reopening possibly could be the client's recent marriage. Unfortunately, the time within which to file a motion to reopen had expired. The lawyer tells his client that he cannot help and sends him on his way.

This scenario presents a competency question which appears to involve all of the components that contribute to competency, the most importance of which are lack of knowledge and thoroughness. The lawyer's handling of this matter was clearly incompetent in violation of MR 1.1.

Analysis

First, the lawyer was wrong on the law from the get-go. He should have done his research before he began the family-based residency application. The scenario is silent as to whether the lawyer was familiar with removal cases, but we can only assume he was not. Under those circumstances, he should not only have researched withholding of removal, he should have taken steps to obtain the client's immigration history. Most importantly, he should have researched the procedural rules to determine the time by which any motions concerning the withdrawal of removal could be made, order to preserve that option for his client as well. It goes without saying that he should have consulted with other experienced counsel for advice.

Once he does the research (albeit too late), the lawyer learns that he has totally mishandled the matter and wasted the client's time and money. But his client might have had a basis upon which to move to re-open the underlying proceedings out of time, if he could establish that the failure to do so timely arose from his lawyer's ineffective assistance of counsel. The only way the client would know that would be if the lawyer admitted his

incompetence to the client and suggested he retain new counsel to file an IAC. At a minimum, the lawyer should have recommended he seek new counsel for advice on whether there were other avenues he could pursue, in particular, ineffective assistance of counsel.

Hypothetical Ten: Motions, Reconsiderations, and Appeals: When Enough is Enough!

A foreign national came into the United States with an F-1 visa [student] on March 29, 2008. However, he never attended school and ultimately was served with an NTA on February 14, 2009. He was ordered removed on February 2, 2010. While in removal proceedings, he retained a lawyer, who filed an I-130 petition on May 1, 2009 after the client's marriage to a United States citizen on April 4, 2009. The I-130 was approved on November 11, 2009, but the Immigration Judge denied the I-485 adjustment application which was based on the approved I-130 petition on February 11, 2010. The client's wife withdrew her I-130 upon divorce from the client in July 2010. Thereafter, on August 28, 2010 the same lawyer filed another I-130 based on the client's subsequent marriage to another United States citizen, which marriage was going well. The USCIS approved the I-130 petition on March 26, 2012. The lawyer then filed an I-485 for the client on April 13, 2012.

At the same time, the lawyer filed a motion to reopen the prior proceedings with the immigration judge but the motion was denied as being untimely filed. The lawyer appealed the denial of the motion to reopen to the Board of Immigration Appeals, and the appeal was denied. The lawyer then filed a motion to reconsider with the immigration judge and it was denied as being untimely. The lawyer then filed an appeal of the motion to reconsider with the BIA, which was also denied. The client finally left the United States on March 30, 2014.

This scenario presents both a question of competency and honesty, since it involves what appear to be numerous filings that were futile or even frivolous.

Analysis

Is This Just Zealous Representation Arising From Lack of Knowledge and Procedures or a Ruse by a Greedy Lawyer Trying to Generate Fees?

Here the lawyer as least appeared to have sufficient knowledge and skill to process a marriage-based residency application. However, she lacked knowledge as to how to proceed when the client married again and decided to seek permanent residency on the basis of the second marriage.

The lawyer was correct in filing a new I-130, but that is when her level of knowledge fell short— because the motion to reopen was untimely, all subsequent filings premised on the motion to re-open were futile as a matter of law or untimely. There are two possible explanations for the lawyer's conduct here. The lawyer was simply incompetent in filing or the lawyer could have wanted to generate more fees by filing frivolous motions while appearing to be zealously representing her client. If the lawyer tried to excuse herself on the basis of lack of knowledge, she would be found to be incompetent. If the lawyer took the position that she did know the law, then she would be found to have engaged in dishonest conduct, in this instance, "churning."

Hypothetical Eleven: The Merits Hearing: Calling the Right Witnesses

A lawyer represents Jaime in Immigration Court proceedings. He is in proceedings for a domestic violence offense that occurred more than ten years ago. This offense makes him removable pursuant to INA §237(a)(2)(E). Jaime's defense is Cancellation of Removal for Lawful Permanent Residents. The statutory elements he must prove to win his case are (1) he has been a permanent resident for five years, (2) he has resided in the United States continuously for seven years after having been admitted in any status, (3) he has not been convicted of an aggravated felony, and (4) he warrants a favorable exercise of discretion. Jaime can clearly prove points 1–3. Therefore, the only issue remaining is discretion.

In order to provide grounds for the exercise of discretion in Jaime's favor, the lawyer wants to show that Jaime has been rehabilitated. Although he has had several charges of drunk driving and public intoxication in the past several years, he has had nothing on his record for at least one year and produces AA records for the past six months. The lawyer carefully prepares his brother and his wife as witnesses. They will both testify they have not seen Jaime drink any alcohol in at least one year. The day of the trial, his brother cannot attend. Instead, Jaime's sister shows up at the last minute.

The lawyer asks the Immigration Judge for a continuance, but he denies the request. The lawyer strongly believes that Jaime needs at least one more corroborating witness (aside from wife) to win his case. During a short recess, the lawyer takes Jaime's sister out into the hallway and spends ten minutes questioning her about Jaime's drinking habits. She swears up and down she hasn't seen him drink. The lawyer puts Jaime's sister on the stand during the case and she testifies as expected. During cross examination, however, the government prosecutor asks about Jaime's other possible criminal activities and the sister admits she knows that Jaime has physically abused his wife at least once in the recent past. Based on the sister's testimony, the Immigration Judge finds that Jaime has not shown sufficient rehabilitation and denies his case.

This scenario presents a competency question involving trial preparation, legal knowledge and skill when a lawyer's best efforts go awry. It's a close question as to whether the lawyer violated MR 1.1. And an even closer question as to whether he would be disciplined.

Analysis

Here, the lawyer has demonstrated that he is competent in handling a cancellation of removal case. He knows the legal issues and procedures. He has the necessary trial skills, knowing how to present evidence in the best light of his client and to prepare witnesses. He has prepared his case with the necessary thoroughness, by making the decision to present two competent witnesses on the client's behalf.

The failure of one of his witnesses to appear is beyond the lawyer's control as is the Judge's refusal to grant a continuance. In this situation, the lawyer has sufficient knowledge and skill to conclude that Jaime needs a second witness to succeed. He knows there are risks in putting on a witness who has not been sufficiently prepared, which under normal circumstances would probably take few hours. He does his best under the circumstances when he deposes the sister. Nothing in the facts suggests that she would not be a good witness.

From the facts, it appears that in the limited amount of time he had to speak with Jaime's sister, the lawyer did not ask the sister about any other conduct that would reflect badly on Jaime, particularly in light of the domestic violence charge. He did not anticipate that the prosecutor might go beyond the scope of her direct testimony, which presumably was limited to alcohol abuse.

Clearly, the decision to call Jaime's sister as a witness turned out to be a mistake. Whether it amounts to incompetence is another question. During the ten minute "deposing", if the lawyer had asked Jaime's sister about other conduct that might reflect on rehabilitation or even asked about domestic violence directly, he would have gained information that probably would have made him decide not to call her as a witness. Or, he might have decided to call her anyway, but address the issue on direct examination in an attempt to neutralize the information, and still illicit the positive testimony about sobriety.

Under the totality of the circumstances, it would be hard to make the case that the lawyer was incompetent. There simply are times when a lawyer is called upon to make a judgment call weighing the risks that attend one choice versus another. The lawyer made an educated decision based on sufficient knowledge of the law, skill, preparation and thoroughness under the circumstances. He ought not to be found to have violated MR 1.1.

D. State Rule Variations

One of the bedrock principles of an attorney's ethical obligations is that he or she be competent. The very first rule in the ABA Model Rules of Professional Conduct, Model Rule 1.1, provides, "A lawyer shall provide

competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Each state (and the District of Columbia) has a competence requirement in its respective ethical rules. Of the 50 states and the District of Columbia, 45 jurisdictions apply the current version of Model Rule 1.1[86] (seven of which add further substance to Model Rule 1.1) and six jurisdictions have a different requirement for competence.[87]

Jurisdictions that Add Substance to Model Rule1.1

There are seven jurisdictions that contain the text of Model Rule 1.1 in their respective competence rules, but add additional language that is not provided in the Model Rule itself. These seven jurisdictions are Alabama, Alaska, the District of Columbia, Georgia, Louisiana, Nebraska, and New York. Language additions and variations for each of the seven jurisdictions are articulated below.

Alabama

In addition to following the language of Model Rule 1.1, Alabama's competence rule also contains language that allows a lawyer and a client to agree to limit the scope of representation, therefore limiting the definition of competence to the competence necessary for such limited representation.

Alaska

Alaska's version of the competence rule adds another subsection to the rule, which is very similar, though not identical, to Comment 3 to Model Rule 1.1 regarding emergency situations. That subsection provides that in the case of an emergency, a lawyer may provide legal advice concerning a matter in which he or she "does not have the skill ordinarily required." The rule limits such assistance to that which is "reasonably necessary in the circumstances" and requires the lawyer to advise the client of the lawyer's limited knowledge concerning that matter.

Washington, DC

The District of Columbia's version of the competence rule also adds another subsection to the rule. The subsection provides a reasonable lawyer standard, adding that a lawyer must "serve a client with skill and care commensurate with that generally afforded to clients by other lawyers in similar matters."

Georgia

Georgia's rule regarding competence contains much of the language in Model Rule 1.1, but makes some slight changes and additions. Georgia's competence rule contains all of the language from Model Rule 1.1, except in the second sentence (of the Model Rule), the Georgia rule states that "competence" requires the legal knowledge, skill, thoroughness, and preparation that is reasonably necessary for a representation, while Model Rule 1.1. Lists the requirements for "competent representation." The Georgia rule also inserts another sentence in between the two sentences of the Model Rule, providing that as part of competent representation, a lawyer "shall not handle a matter" that he or she "knows or should know" is "beyond the lawyer's level of competence," unless he or she associates with another lawyer who is reasonably believed to be competent to handle the matter. Similarly, Comments 1 and 2 to Model Rule 1.1 allow a lawyer to associate with another lawyer in order to provide competent representation.

Louisiana

Louisiana's version of the competence rule adds two additional subsections. The first requires a lawyer to comply with the minimum requirements of continuing legal education as prescribed by the Louisiana Supreme Court. This is similar to the requirement found in Comment 8 to Model Rule 1.1 regarding maintaining

[86] The following states have adopted the language of Model Rule 1.1, but use a different numbering system: Florida (4-1.1), Iowa (Rule 32:1.1), Kansas (Rule 226:1.1), Kentucky (Rule 3.130:1.1), Nebraska (Rule 3-501.1), New Mexico (16-101), South Carolina (Rule 407:1.1), Tennessee (Rule 8-1.1), Utah (Rule 13:1.1) and Wisconsin (Rule 20:1.1).

[87] In other words, 38 jurisdictions apply a competence rule that is identical to Model Rule 1.1. Seven jurisdictions include all of the language in Model Rule 1.1, but add additional substance to their respective competence rules. The competence rules in six jurisdictions very significantly from Model Rule 1.1.

competence. The second requires that a lawyer comply with the Louisiana Supreme Court's rules regarding annual registration, including payment of bar association dues and fees, timely notification of change of address, and disclosure of trust account information.

Nebraska

Nebraska's version of the competence rule makes only a minor change to Model Rule 1.1. In the second sentence, in addition to the Model Rule's requirements of legal knowledge, skill, thoroughness, and preparation, Nebraska Rule §3-501.1 requires judgment that is reasonably necessary for the representation.

New York

Finally, New York's version of the competence rule adds two additional subsections. The first requires a lawyer not to handle a legal matter if the lawyer knows or should know that he or she is not competent to handle it (unless he associates with a lawyer who is competent to handle it). Comments 1 and 2 to Model Rule 1.1 similarly allow a lawyer to associate with another lawyer in order to provide competent representation. The second provides that a lawyer may not intentionally "fail to seek the objectives of the client through reasonably available means" under the law and the ethical rules, or "prejudice or damage the client during the course of representation" (except to the extent that the ethical rules allow or require).

Further, as discussed in note --, herein, New York's version uses the word "should" rather than "shall". As a practical matter this difference, while probably more logical, does not impose a lesser obligation on the New York lawyer, in that the MR 1.1 qualifies the duty of competence by applying a "reasonable" standard and it does not appear that a one-time mistake would rise to the level of misconduct warranting a disciplinary sanction.

Jurisdictions with Different Competence Requirements

As noted, there are six jurisdictions that vary significantly from the competence requirements set forth in Model Rule 1.1. These six jurisdictions are California, Michigan, New Hampshire, New Jersey, North Carolina, and Texas. Language additions and variations for each of the seven jurisdictions are articulated below.

California

California generally structures its Rules of Professional Conduct differently from the Model Rules, and the California competence rule is distinct in several respects from Model Rule 1.1. California Rule 3-110(A) requires that a lawyer not "intentionally, recklessly, or repeatedly fail to perform legal services with competence." California Rule 3-110(B) defines competence as applying the diligence, learning and skill, and mental, emotional, and physical ability that is "reasonably necessary" for the performance of legal services. California 3-110(C) provides that an otherwise incompetent lawyer will be considered competent if he or she either associates with (or in certain circumstances, consults with) a lawyer reasonably believed to be competent, or if he or she acquires sufficient learning and skill before providing the legal service.

Michigan

Michigan's competence rule does not explicitly define competence. Instead, the rule requires that a lawyer provide competent representation to his or her clients and prohibits a lawyer from: (a) handling a matter which he or she is not competent to handle without associating with a lawyer who is competent to handle the matter; (b) handling a matter without preparation adequate under the circumstances; and (c) neglecting the matter.

New Hampshire

New Hampshire's competence rule contains only the first sentence of Model Rule 1.1 in subsection 1.1(a). New Hampshire Rule 1.1(b) describes the minimum requirements of competence, and includes the requirement that the lawyer have specific knowledge about the fields of law in which the lawyer practices, perform the techniques of practice with skill, identify areas beyond his or her competence, properly prepare, and pay attention to details and schedules. New Hampshire Rule 1.1(c) sets the minimum requirements for the performance of client services, and includes the requirement that the lawyer gather sufficient facts regarding the client's problem,

formulate the material issues raised, determine the applicable law, identify alternative legal responses, develop a strategy, and undertake actions on the client's behalf in an appropriate and effective manner.

New Jersey

New Jersey's Rule 1.1 is titled "Competence," but the language of the rule deals only with negligence and neglect. New Jersey Rule 1.1(a) prohibits a lawyer from handling or neglecting a matter in such a way that would constitute gross negligence. New Jersey Rule 1.1(b) prohibits a lawyer from exhibiting a pattern of negligence or neglect in the handling of legal matters generally.

North Carolina

North Carolina's competence rule prohibits a lawyer from handling a legal matter that the lawyer is not competent to handle without first associating with a lawyer that is competent to handle the matter.

Texas

Finally, Texas' competence rule is completely different than Model Rule 1.1. Texas Rule 1.01(a) prohibits a lawyer from accepting or continuing employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence unless one of the following applies: (1) another lawyer who is competent to handle the matter is associated in the matter with the prior consent of the client; or (2) the advice or assistance of the lawyer is reasonably required in an emergency and the advice and assistance is limited to that which is reasonably necessary under the circumstances. Texas Rule 1.01(b) prohibits the neglect of client matters and requires diligence. Texas Rule 1.01(c) defines neglect as "inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients."

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Meghan Moore

David Bloomfield

Reid Trautz

Maheen Taqui

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American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.3
Diligence

Sherry K. Cohen, Reporter

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MODEL RULE 1.3 DILIGENCE

Introduction

Consider the Following

An undocumented foreign national and his U.S. citizen spouse retain an experienced immigration lawyer with a very busy practice to handle a marriage-based residency application. The foreign national had entered the country with a valid visa, and later decided to overstay when he met his future spouse so that he could get married to her. The couple meet with the lawyer and provide all of the requested documentation. Because the foreign national is out of status, it is important that the lawyer submit the papers promptly, and the lawyer tells the clients he will do so. After two months, the clients call and the lawyer tells them their matter is proceeding. After another two months, they call and the lawyer gives them the same answer. Over the next several weeks, they leave messages for the lawyer, which he does not return. When they appear one day at the office without an appointment, the lawyer tells them that he filed the papers just a week ago, which is true. He apologizes. Later on, the lawyer receives a USCIS request for further evidence, but he is too busy to respond and then forgets about it. The clients call the lawyer from time to time and the lawyer tells them the matter is proceeding. Frustrated, the clients go to another immigration lawyer and learn that because the lawyer did not respond to requests for further evidence, the application was denied. The clients discharge the lawyer and file a complaint with the appropriate disciplinary authority.

The above scenario illustrates one of the most common breaches of a lawyer's professional responsibilities: the duty to represent a client with "reasonable diligence and promptness" as required under MR 1.3. Here, the lawyer did neither and under the facts would most likely be found to have violated MR 1.3.[1]

MR 1.3 would seem unnecessary given that lawyers surely understand that clients generally come to them to do something. In a lawyer-client relationship, the client is a consumer. Some lawyers might be bristle at the analogy, but when someone hires a plumber to fix a leaky drainpipe, he expects the plumber to do whatever has to be done to fix it, and do it promptly. Clients retain lawyers because they need help with a legal problem and any lawyer who fails to act with reasonable diligence and promptness is letting his client down. For an immigration client, the consequences of bad lawyering involving neglect may result in loss of legal status or actual removal.

For any lawyer, the failure to handle a matter with reasonable diligence and promptness may not only result in loss of the client, but also loss of other business due to damage to the lawyer's reputation. It is very easy for a disappointed client to share her bad experience with friends, neighbors, relatives, and her religious community or even through social media.

A lawyer who fails to act diligently and promptly may also find himself defending a disciplinary complaint. Not surprisingly, many lawyers who mishandle a case due to lack of diligence and promptness will likely face a lack of competence allegation, in violation of MR 1.1.[2] Frequently, such lawyers may also engage in misconduct involving MR 1.4 (failure to communicate), MR 3.2 (failure to expedite litigation), MR 5.1(failure to supervise other lawyers), and MR 5.3 (failure to supervise

[1] In addition to the inexcusable delay and outright failure to respond to the request for evidence in violation of MR 1.3, here, the lawyer's repeated statements that the "matter is proceeding" was misleading, if not a lie, in violation of MR 8.4(c). He also failed to properly communicate with his clients, in violation of MR 1.4.

[2] MR 1.1 provides that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. *For a comprehensive discussion of MR 1.1 see Ethics Compendium, Chapter 1.*

nonlawyers). Further, lawyers who lack diligence (or suffer a significant lack of judgment out of panic) often lie to their clients or fabricate false documentation to conceal their other misconduct. This amounts to a violation of MR 8.4(c) (dishonesty in general) and MR 4.1(dishonesty in client representation).

For an immigration lawyer, a finding of misconduct warranting a censure, suspension or disbarment by a state disciplinary authority may have consequences beyond those sanctions. The Executive Office of Immigration Review (EOIR) as well as the Circuit Court of Appeals, in which the lawyer is admitted, may impose similar sanctions under the doctrine of reciprocal discipline.[3]

The Executive Office for Immigration Review (EOIR) also has its own grounds for discipline, one of which is essentially the same as MR 1.3.[4] A related but also separate ground for discipline under EOIR rule is "ineffective assistance of counsel," which may result from a lawyer's lack of diligence and promptness, as well as incompetence.[5] Another EOIR ground for discipline related to a lack of diligence and promptness is a lawyer's repeated and unexcused failure to appear at scheduled conferences and hearings.[6] While a lawyer's failure to appear at a hearing or conference may not only have a harmful consequence for the client, it also interferes with the ability of the agency to manage cases, wastes an adjudicating official's or immigration judge's time and otherwise undermines agency or efficient court administration.

In addition to the potential for disciplinary sanctions, a lawyer who is not able to represent his clients with diligence and promptness will find little satisfaction in his work and run the risk of destroying his practice altogether.

All immigration lawyers, as well as those who practice in other areas, know they cannot neglect a client's case. They know their clients expect them to act diligently and with promptness in handing their cases. But understanding what actually amounts to neglect in an immigration matter may not always be clear. As in the case of MR 1.1 (competence), the language of MR 1.3 is quite simple and a plain reading of the rule may not provide sufficient guidance concerning the level of dedication and commitment required by MR 1.3. Immigration lawyers may need help in answering the following questions, for example:

- Would an immigration lawyer be found to have violated MR 1.3 if he failed to follow the client's instruction to file a marriage-based residency application when the lawyer believes the client has a better chance of success pursuing an employment based application?[7]
- Would an immigration lawyer be found negligent if he failed to advise his client of all the available avenues for permanent residency?
- Would a lawyer be found to have violated MR 1.3 if he missed a filing deadline because he did

[3] For a discussion of the consequences of reciprocal discipline for immigration lawyers *see* discussion on Rule 1.1.

[4] Under 8 CFR §1003.102(q) the EOIR/DHS may impose discipline when the lawyer fails "to act with reasonable diligence and promptness in representing a client.

[5] Under 8 CFR §1003.102(k) the EOIR/DHS may impose discipline based on "conduct that constitutes ineffective assistance of counsel, as previously determined in a finding by the Board, an immigration judge in an immigration proceeding, or a Federal court judge or panel, and a disciplinary complaint is filed within one year of the finding."

[6] Under 8 CFR §1003.102 (-) the EOIR/DHS may impose discipline based on a lawyer's repeated failure "to appear for scheduled pre-hearing conferences or hearings in a timely manner without good cause."

[7] We are not aware of any disciplinary cases in which a lawyer was sanctioned for failing to pursue one viable strategy over another. However, some clients have brought malpractice claims against immigration lawyers for failing to pursue an alternate strategy they *claim* would have been successful. *See, e.g.*, *Ertur v. Edward*, 2007 U.S. Dist. LEXIS 21401 (W.D. Wash. Mar. 22, 2007); *Delgado v. Bretz & Coven, LLP*, 109 A.D.3d 38 (N.Y. App. Div. 2013 and *Liu v. Allen*, No. 03-CV-263 (D.C. Ct. of Appeals, argued Jan. 25, 2005- Mar. 16, 2006). *See also* Hypothetical Six below.

not send the application by overnight mail?

- Would a lawyer be found to have violated MR 1.3 if he failed to confirm receipt of an application or periodically check the status of his case?

- Would a lawyer be found to have violated MR 1.3 if he failed to return a client's phone call within 24 hours? A week? A month? What about if he failed to respond to repeated follow-up phone calls in the same day, after the lawyer had already spoken to the client once?

- Would a lawyer be found to have violated MR 1.3 if he failed to provide information about the immigration consequences of pleading guilty to a certain crime?

- Would a lawyer be found to have violated MR 1.3 if she delegated the responsibility to a non-lawyer to notify the client of a court date and the non-lawyer made just a few calls and nothing more without ever reaching the client?

- Would a lawyer be found to have violated MR 1.3 by missing an email properly delivered to the lawyer from a client authorizing the lawyer to begin work on his case, which requires immediate attention?[8]

- Would a lawyer be found to have violated MR 1.3 for failing to advise her client who is travelling out of the country about the visa application requirements relevant to her case?

- Would a lawyer be found to have violated MR 1.3 by advising a recently retained client that he cannot begin work on his case because of other client matters which have a higher priority?

We begin by discussing the wording of the MR 1.3 in the first instance and then the Comments. Where applicable, we shall cite to the EOIR rules. We will focus on representative disciplinary cases and special areas of concern, among others, ineffective assistance of counsel claims, supervisory responsibility, delegation and mental health impairments. Although the model rules specifically provide that they "are not designed to be a basis for civil liability,"[9] as a practical matter, ethical violations, especially those involving diligence and promptness (as well as competence) can lead indirectly to malpractice claims and liability for damages. For this reason, we will also discuss representative malpractice cases against immigration lawyers based on neglect. In addition, because some state's diligence rules vary from MR 1.3, we will provide a summary of state variations, keeping in mind that prudent and conscientious lawyers will be sure to carefully read their home state's professional responsibility rules. Lastly, we will provide and discuss various immigration law hypotheticals involving diligence and promptness.

A. Text of Rules

8 CFR §1003.102—Grounds for Discipline: EOIR/DHS

A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:

(q) Fails to act with reasonable diligence and promptness in representing a client.

(1) A practitioner's workload must be controlled and managed so that each matter can be handled competently.

[8] This question does not address the possibility that a client's email is put into "spam" or "junk" mail, which arguably would excuse the lawyer's having missed the email.

[9] Preamble to ABA Model Rules, ¶ 20.

(2) A practitioner has the duty to act with reasonable promptness. This duty includes, but shall not be limited to, complying with all time and filing limitations. This duty, however, does not preclude the practitioner from agreeing to a reasonable request for a postponement that will not prejudice the practitioner's client.

(3) A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations. If a practitioner has handled a proceeding that produced a result adverse to the client and the practitioner and the client have not agreed that the practitioner will handle the matter on appeal, the practitioner must consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal.

ABA Model Rule 1.3—Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment—Model Rule 1.3

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. *See* Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's workload must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. *See* Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. *See* Rule 1.2.

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 28 of the American Bar Association Model Rules for Lawyer Disciplinary Enforcement (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

B. Key Terms and Phrases

Diligence

Diligence is not a defined term but the Comments provide an explanation as it pertains to the standard of conduct for a lawyer. Diligence involves doing whatever has to be done to provide the agreed upon legal services. It goes hand in hand with competence (MR 1.1). Although diligence is often associated with the concept of "zealous representation", there are limits. As noted in Comment 1 to Rule 1.3, a "lawyer is not bound…to press for every advantage that might be realized for a client."

A lawyer has the professional discretion to pursue what she believes is the best strategy to achieve the relief sought. Being mindful of MR 1.4, however, the lawyer should inform the client of all available options. Further, a lawyer's obligation to do whatever is necessary to advance the client's cause still may only be fulfilled through lawful and otherwise ethical conduct.[10] For example, under MR 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent.[11] This has particular significance for an immigration lawyer whose client's desperation to obtain legal status, for example, may override the client's concerns about misrepresentations on an application that may advance a claim for relief.

Diligent representation also would not justify "offensive tactics" or uncivil conduct. In any event, for an immigration lawyer, there would be little to gain by treating USCIS officials, trial counsel or immigration judges disrespectfully. If anything, it would only hurt the client.

Because the obligation of diligence applies to whatever it is that the lawyer has agreed to do for the client, the prudent and conscientious immigration lawyer should memorialize the nature of work and duties to be performed for the client's benefit in a retainer agreement or letter of engagement even if it is not otherwise required. As in the case of the obligation to provide competent representation, a lawyer may find it necessary to limit the scope of the representation as to matters he may not have time to handle or those beyond his level of competence, as provided in MR 1.2[12] For example, if a matter will be subject to appeal, the lawyer should set out in advance whether the lawyer will handle it. If there has been no agreement one way or the other, diligence would require advising the client that an appeal is a remedy and the filing deadline.[13] In other words, even where the scope of representation is limited, the lawyer cannot simply walk away.

[10] Comment 1 to MR 1.3 uses the word "zeal" in describing diligence but there is no Model Rule specifically requiring "zealous representation."

[11] MR 1.2 (d) provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[12] Comment 4 to MR 1.3.

[13] The failure to advise the client about the remedy of appeal would also violate 1.4 (a)(2).

Like most of the Model Rules, the duty of diligence is owed to the client and implicitly only where the lawyer-client relationship has been established. In the immigration context, where obtaining legal status may involve several steps over a period of years, the prudent and conscientious lawyer should resolve any question of the duration of the lawyer-client relationship, preferably in writing.[14]

MR 1.3 has no intent component and a lawyer may violate the rule irrespective of the outcome of the matter. For example, an unreasonable delay in pursuing a matter may violate MR 1.3 rule even if a filing deadline or statute of limitations has not expired.

Many immigration lawyers have solo or small firm practices. To account for the possibility of a solo practitioner's disability or death, diligence under MR 1.3 includes having procedures in place for the lawyer's cases to be reviewed by another competent lawyer, notifying clients, and, especially where immediate action may be necessary, granting access to the files.[15] Although the rule does not specifically address the issue of a lawyer's voluntary decision to close his practice altogether or move it to a different firm or another state, diligent representation would include notifying the client and providing access to the file if the representation is to be terminated. As in other instances, the lawyer may not simply abandon his client.

Promptness

The term promptness is also not defined, but clearly it speaks to unjustified delay. As noted in Comment 3, "[p]erhaps no professional shortcoming is more widely resented than procrastination." [Emphasis added][16] Unreasonable delay may not only cause a client injury, but it often causes the client to lose confidence in the lawyer and interfere with the lawyer-client relationship. However, there may be times when moving more slowly may be advantageous to the client and for that reason the term "promptness" is also qualified by the term "reasonable" in the rule. What is reasonable promptness, like reasonable diligence, depends on the circumstances. In the immigration context, for example, a lawyer may determine that she must wait to receive copies of the client's immigration records through a FOIA request before taking any action. Or an immigration lawyer may determine it is necessary to wait to obtain documents from outside the U.S. to be sure that the client's remedy is viable. There are also instances when it may be more advantageous for a client to delay filing for relief in order to satisfy the requirements of an alternate form of relief that has a better chance of success.

As in the case of diligence, the need to act promptly should not be a basis for refusing a professional courtesy, such as an adjournment of a conference or trial.[17]

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[14] Lawyers should check their home state's rule as to the circumstances when a written letter of engagement or retainer agreement is required. *However, it is always better practice to use a written retainer agreement or letter of engagement.*

[15] Comment 5 to MR 1.3.

[16] Because procrastination has such a profound negative effect on a lawyer's ability to provide diligent representation, we quote Comment 3 again in its entirety:

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[17] Comment 3 to MR 1.3.

Reasonable

The only term used in MR 1.3 that is defined in MR 1.0 (Terminology) qualifies the degree of diligence and promptness necessary in representing a client.

MR 1.0(h) advises that the terms '"reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer." Implicitly, the "reasonable person" standard of conduct is not sufficient; it's the "reasonable lawyer" standard that is applied. What is reasonable will depend on how a prudent, conscientious and competent lawyer would conduct herself under the particular circumstances of the representation.

"Neglect" versus "Diligence and Promptness"

While the model rules use the terms "diligence and promptness" in setting the standard of care for the lawyer, layperson and even the courts may use the term "neglect" when referring to a lawyer's failure to perform the undertaken legal tasks diligently and promptly. There are even a handful of analogous state rules that expressly employ the term "neglect" to describe conduct that falls below the standard of care.[18] When the term neglect is used, the desired conduct is stated as something the lawyer may not do or is prohibited from doing, *e.g.*, a lawyer shall not neglect a client's legal matter. When the terms diligence and promptness are used, the conduct is stated as an affirmative duty, *e.g.*, a lawyer shall act with diligence and promptness in representing a client. Either way, a lawyer has an ethical obligation to do what he and the client have agreed he will do, presumably in the client's best interests. In this report we will use the term "neglect" interchangeably with "diligence and promptness".

Negligence

In the context of legal malpractice actions the term "negligence" is frequently used to describe the lawyer's act or inaction, which falls below the standard of care of a reasonable lawyer. As discussed in the legal malpractice section at pp. 16, the plaintiff must also be able to prove that the lawyer's negligence was proximate cause of the injury. By comparison a lawyer may violate MR 1.3 even when the outcome of the case is successful.[19]

C. Annotations and Commentary

Representative Disciplinary Cases: Lack of Diligence and/or Promptness

There appear to be very few ethics opinions focusing on the subject of neglect or MR 1.3. This is not surprising since a lawyer would not likely ask a bar association for an opinion about what kind of conduct would constitute neglect, or in the alternative, what would diligent representation amount to in a particular matter. Any lawyer who was that concerned about the issue would more than likely be living up to the standard of care required for a particular area of law. However, there are a significant number of disciplinary cases that deal with instances in which lawyers have violated Rule 1.3. This is so in part because the injury flowing from neglect is very apparent to the client. A client does not have to know anything about the rules of professional responsibility to know whether his lawyer failed to respond to reasonable requests for information, failed to submit papers timely, or failed to take any action at all. Sometimes after retaining new counsel, clients learn that their lawyers did not advise them of avenues

[18] New York, for example, provides that a lawyer shall not "neglect" a client matter. See N.Y RPC 1.3(a). *See also* State Rule Variations from MR 1.3 at pp. 28.

[19] *See, e.g., In re Karlson*, 778 N.W.2d 307, 312 (Minn. 2010)(immigration lawyer suspended for minimum one year based on multiple acts of neglect, failure to communicate and misrepresentations; court noted that regardless of whether lawyer's misconduct "jeopardized" the client's position as to immigration claims, failures to communicate and misrepresentations "are intensely frustrating to clients, reflect adversely on the bar, and are destructive of public confidence in the legal profession.")

for relief that were stronger than the one that was pursued. They may learn that their lawyers submitted briefs that were perfunctory at best. Many clients learn that their lawyers concealed their neglect through affirmative misrepresentations or omissions. Clients may even learn that their lawyer fabricated or altered documents to support their misrepresentations.

Prudent and conscientious lawyers may shake their heads in disbelief, but as the disciplinary cases we discuss show, many lawyers fail to act with the diligence and promptness required for good lawyering. The cases, all of which involve immigration lawyers, illustrate the ways in which the lawyers neglect their cases. Although every immigration case is unique, we see the neglect roughly falling into several general categories: (1) failing to meet deadlines or appear in court, (2) engaging in unreasonable delay, (3) failing to conduct adequate investigations or prepare, and (4) the most extreme example of neglect, doing nothing at all. Often there is overlap.

Failure to Meet Deadlines/Court Appearances

As a general matter, a lawyer who is unable to meet regulatory or court-imposed deadlines may also have difficulty keeping track of and attending conferences or court appearances. This misconduct may result from poor calendaring or other failures in case management even when the lawyer is committed to providing good representation. Other causes may involve loss of interest in continued practice, what is sometimes called "burn-out" or unfortunately, in the worst cases, the lawyer's lack of integrity.

Pattern of Neglect: Missed Filing Deadlines and Court Appearances

Minnesota, Two-Year Suspension

An immigration lawyer's failure to meet deadlines and comply with conference or court dates may extend over a period of years before he is subject to disciplinary investigation. A textbook case of failure to provide diligent representation involves a Minnesota immigration lawyer who was found to have engaged in a pattern of neglect, as well as non-communication over an eight-year period involving seven matters.[20] Among other acts of neglect, in a removal case in which the client had asserted an asylum claim, the lawyer failed to provide the client's passports timely, failed to submit witness affidavits and other documents by the court's deadline (some of which were therefore excluded), failed to inform the client of the immigration judge's adverse decision, causing the client to miss the deadline to file a bond after voluntary departure was ordered, failed to respond to phone calls and missed meetings with the client. The lawyer also mishandled three religious worker matters. In one, he did not respond to a notice of intent to deny the application and it was denied. The lawyer claimed he submitted an appeal but never did. In the other two, the lawyer allowed the clients' R-1 visas to expire and did not appeal the denials of their I-360 petitions. As to yet another client, the lawyer was asked to file a petition for review with the Eleventh Circuit, but he filed it out of time and it was dismissed. In most of the matters in which this lawyer failed to meet deadlines or the matters were dismissed for other reasons, the lawyer failed to advise his clients or otherwise made misrepresentations to them to conceal his misconduct. The court imposed a minimum two years suspension observing that the lawyer's "wide-ranging misconduct not only harmed his clients, but also harmed the legal profession by undermining the public's trust in the competence, diligence and integrity of lawyers."[21]

[20] *In re Fru*, 829 N.W.2d 379 (Minn. 2013)[immigration lawyer engaged in a pattern of misconduct in violation of multiple rules, including Rules 1.1 (competence), 1.3 (diligence) and 8.4 (dishonesty).

[21] *Id. See also Statewide Grievance Committee v. Friedland*, 609 A.2d 645 (Sup. Ct.Conn. 1992)(Connecticut lawyer notified well in advance of hearing date but failed to advise client of hearing and also he did not appear, resulting in *in absentia* deportation order; lawyer found to have failed "to act with reasonable diligence and promptness in responding to the notice of the hearing"; lawyer disbarred for this and other violations in other matters).

Failure to Meet Deadline in Employment-Based Petitions; Failure to Appear at Asylum Hearing

Washington DC, Four-Month Suspension

In a Washington D.C. case in which the prior analogous Code of Professional Responsibility Disciplinary Rules still applied, an immigration lawyer who handled labor certification and asylum cases in the early 1990s failed to meet local agency deadlines for the labor certifications, resulting in the cases being deactivated. In another immigration case involving political asylum, the lawyer failed to appear at the hearing altogether. Although she had moved for a continuance, the lawyer did not later respond to the court's request for information and the continuance was not granted. To add insult to injury, the lawyer failed to file an appeal as promised. Apparently, based on analogous precedent and the absence of a prior disciplinary history, the lawyer received only four-month suspension.[22]

Nevada: Five-Year Suspension

A California admitted lawyer, who practiced immigration law in Nevada, was found to have violated Rule 1.3 because she missed the filing deadline for an appeal of the immigration court's "rejection" of her submission of incomplete paperwork. The client, a registered nurse, was fired when her immigration status lapsed. Based on the lawyer's failure to submit a meaningful answer to the disciplinary charges, the charges were deemed admitted. The lawyer had a prior disciplinary history, which involved the failure to file a brief in support of a motion before the immigration authorities. The lawyer was suspended for five years.

Failure to Comply with Court Scheduling Orders on Petitions for Review with Circuit Court of Appeals

A particular form of neglect has been addressed by at least three federal circuit courts of appeal, which recently had been inundated with petitions for review of asylum cases after procedural reforms to reduce backlogs at the Board of Immigration Appeals expanded the use of affirmances without opinions by single BIA members. Many of the lawyers handling asylum appeals had little or no appellate court experience practicing before such federal courts and were held accountable for the quality of their work. Because of shoddy legal work that led to defaults in many cases, the circuit courts instituted their own disciplinary investigations against the lawyers and imposed sanctions. In all of the cases, the courts not only considered the adverse impact of the misconduct on the lawyer's clients, but also the burden placed on the courts in proper case management.

The Court of Appeals for the Second Circuit publicly reprimanded certain lawyers for a pattern of failing to comply with the court's scheduling orders as to briefs in support of their respective clients' petitions for review of the Board of Immigration Appeals adverse decisions. These reprimanded lawyers had numerous pending petitions for review. For example, in one case, 37 out of 62 petitions filed by one lawyer were dismissed for failure to comply with scheduling orders.[23] In another , 39 of 100 petitions filed

[22] *In Re Ryan,* 670 A.2d 375 (D.C. 1996); *see also In re Cole*, 967 A.2d 1264 (D.C. 2009)(where in only one case lawyer failed to file timely asylum application or request extension of time to file, no prior discipline and lawyer took steps to avoid recurrence, thirty-day suspension imposed); *Matter of Beryl Farris*, 727 S.E.2503 (Sup. Ct. Ga. 2012)(Georgia immigration lawyer violated Rule 1.3 in one matter by not responding to USCIS requests for evidence, filing documents timely and in another failed to appear at hearing, but cooperated with disciplinary investigation and agreed to take remedial measures to prevent similar misconduct in future; public reprimand only. Note: Lawyer found to have violated Rule 1.4 as well for failure to inform client of status of her case).

[23] *In re Yan Wang,* 388 Fed. Appx. 24; U.S. App. LEXIS 14699 (2nd Cir. 2010). (thirty-nine of one hundred pending petitions dismissed for failure to comply with scheduling orders amounting to default).

by another lawyer were dismissed for the same reason.[24] In a third case, 31 of 50 pending petitions were dismissed for failure to comply with scheduling orders.[25]

Similarly, a New Jersey immigration lawyer was publicly reprimanded by the Court of Appeals for the Third Circuit where 12 out of the 30 petitions he filed were dismissed for failure to submit briefs or comply with other procedural requirements and, among other things, failure to seek permission to withdraw which would have enabled the court to notify the clients. Notably, the Court ordered that the lawyer's pending cases be monitored and that any further similar conduct would result in a more severe sanction.[26]

Unreasonable Delay

What constitutes unreasonable delay in an immigration matter will depend on the circumstances, but most immigration lawyers know that for a client who is out of status, sooner is always better than later. A lawyer may avoid an unwarranted allegation of delay as well as a client's disappointment with the time it takes to achieve status by having a frank discussion with the client about the time necessary to file an application, challenges that may happen after filing, including requests for evidence, processing times, and the possibility of an adverse decision, and the need to file an appeal.[27] A lawyer should also explain to her client that on occasion there will be a change in circumstances—based on new facts or law—that may cause the lawyer to reevaluate the theory of the case altogether, which might result in delay.

There may be many reasons why a matter is taking longer than expected, but in order not to violate MR 1.3, a lawyer needs to have a good reason for delay. Too much work is no excuse. Even a lawyer's illness would not excuse a delay unless the lawyer had attempted to obtain permission from the agency or court to adjourn a date and also kept the client informed of the situation causing the delay.

Unreasonable Delay in Filing Visa Applications

Arizona: Two-year suspension

An Arizona general practice lawyer was found to have violated Rule 1.3 when she waited three months to file an E-2 investor visa for a Canadian citizen, after concluding that the client was not eligible for an L-1 "intra-company visa." The lawyer apparently failed to advise the client about the

[24] *In re Mundie*, 452 Fed. Appx. 9; U.S. App. LEXIS 12459 (2d Cir. 2011).

[25] *Matter of Guttlein*, 100 A.D 3d 166 (1st Dept. 2012)(reciprocal discipline in New York based on Second Circuit discipline for neglect of thirty-one of fifty petitions for review which dismissed for failure to comply with scheduling orders); *see also Matter of Salomon*, 402 Fed. Appx 546 (2d Cir. 2010); *In re Spivak*, 469 Fed. Appx. 16 (2d Cir. 2012) *Matter of Rudrakumaran*, 516 Fed. Appx. 9 (2d Cir. 2013); *Matter of Payne*, 707 F.3d 195 (2d Cir).

[26] *In re Suarex-Silverio*, Third Circuit June 2012, available on line at : *http://www.ca3.uscourts.gov/sites/ca3/files/Order_Court_062212.pdf*. *See also* two California state cases based on pattern sloppy and negligently filed petitions with the Ninth Circuit: *Matter of Rosenberg*, 2010 Calif. Op. LEXIS 15 (Sept. 30, 2010)(based on findings in a *Ninth Circuit* disciplinary action, reciprocal discipline imposed where despite thirty years admission to bar, lawyer engaged in pattern of incompetence and negligence in cases before the Ninth Circuit in violation of Cal. Rule 3-110 (which differs somewhat from MR 1.1), court found that the lawyer's actions "repeatedly demonstrated lack of competence that ... harmed his clients..."); *In the Matter of Frank Sprouls*, 2010 Calif. op. LEXIS 5 (Aug 1, 2010)(in reciprocal discipline action, lawyer found to have violated Cal. Rule 3-110 by filing deficient briefs before Ninth Circuit which failed to cite relevant persuasive cases, otherwise respond to government motions, used incorrect case number in motion, and failed to preserve key due process argument for consideration by the circuit court; citing *Ninth Circuit* holding that Sprouls's deficient performance was "plain on the face of the administrative record and rises to the level of a due process violation because [client] 'was prevented from reasonably representing his case' and thus violated Cal. Rule 3-110). *See State Rule Variations that differ from MR 1.3 below.*

[27] Such discussions may also be required under MR 1.4, which covers a lawyer's obligation to communicate with the client about matters relevant to the representation.

delay or the reasons for it.[28] What might have been a reasonable period of time in another type of matter did not apply where the client needed the visa in order to move a business transaction along and there did not appear to be any justification for the delay. The lawyer engaged in misconduct in other matters as well and for this reason he was suspended for two years.

Louisiana: Three-year suspension

In a matter involving representation of only one family, a Louisiana immigration lawyer was found to have violated Rule 1.3 when he failed to file timely visa petitions for an undocumented mother residing in the U.S. and her two children living in Honduras, who were awaiting visas to legally enter the U.S. The lawyer falsely advised the clients that he had filed the applications. When the lawyer eventually filed the papers, he altered copies of blank money orders the clients had given him to demonstrate that he had filed the applications earlier. In fact, he had made the money orders payable to himself, because he needed to buy new money orders for the new higher fees required by the time he actually did file the visa applications. The lawyer provided no explanation for the delay.[29]

Failure to Take Action

For many clients, a lawyer who takes the client's fee and does little or nothing is not much better than a common thief. As discussed below, some negligent or incompetent lawyers, because they panic or are essentially dishonest, try to conceal their negligence through misrepresentations and even forgery. However, while there are times when there may be an excuse or mitigating factors for non-action, there is never an excuse for lying.

Lack of Integrity: No action and misrepresentations to conceal

Colorado: Disbarment

A Colorado immigration lawyer, who agreed to handle several separate immigration matters for a family of Honduran foreign nationals, failed to take any action on their behalf, and compounded his misconduct by lying to cover up his inaction.[30] He failed to file papers to permit the father to adopt the mother's 11-year-old Honduran born grandson as had been agreed, telling the family that the adoption would be "finalized" within a month. He also reassured the family that certain immigration proceedings for the family's three children would be completed in the "near future" when that was not true. One of the children was forced to remain in Honduras as of the time of the disciplinary hearing that was eventually commenced. When another child[31] was arrested in a different state and placed in deportation

[28] *In re Hart*, 2002 Ariz. LEXIS 193 (Sup. Ct. Ariz. 2002)(three-month wait in filing E-2 visa amounted to inexcusable delay where it effected business transaction); *see also In re Paul Winston Gardner II*, 430 Md. 280 (Ct. App. Md. 2013)(a Maryland lawyer who mainly handled business matters, not immigration, failed to file proper L1-L2 visa application and delayed taking remedial measures after USCIS denied it and engaged in other serious misconduct including mishandling of client funds, was disbarred); *In re Loiseau*, 776 N.E.2d 1209 (Sup. Ct. Ind. 2002)(lawyer stipulated he failed to take action on client's contemplated immigration matter for an "unreasonable time").

[29] *In re Hansen*, 888 So. 2d 172 (Sup. Ct. La. 2004)(lawyer suspended for three years, mainly because of the harm to clients caused by unwarranted delay and misrepresentation, mitigating factors, including no prior discipline and remorse, one year of suspension "deferred").

[30] *In re Romero*, 35 P.3d 164 (Sup. Ct. Colo. 1999); *see also Okla. Bar Ass'n v. Shomber*, OK 95 (Okla. 2009)(immigration lawyer disbarred for engaging in pattern of misconduct including performing no work on two labor certification matters, abandoning visa matter after paying filing fee with a bad check, and failing to file visa applications for several religious workers; court noted complexity of immigration law and vulnerability of clients); *see also Attorney Grievance Comm. of Maryland v. Koven*, 761 A.2d 881 (Md. 2000) (Maryland immigration lawyer compounded failure to file employment-based applications for three employees by providing the client with false filing receipts, altered copies of relevant letters and other false or misleading information about the status of the cases; two-year suspension although Bar Counsel argued for disbarment).

[31] U.S. immigration law defines a "child" as an unmarried person under age 21. USCIS and the U.S. Department of State (DOS) call the non-citizen children of U.S. citizens and permanent residents who are older than 21 "sons and daughters." While this may sound like the same thing, the two categories are treated very differently under U.S. immigration law.

proceedings, the family hired a lawyer to represent that child. The Colorado lawyer lied to the replacement lawyer telling him that he had filed a visa petition for the arrested child. The lawyer was found to have violated Colorado's analogous Rule 1.3 providing that a lawyer shall not "neglect" a client's legal matter. Based on the above and other misconduct the lawyer was disbarred. In this case, the only real action taken by the lawyer was to lie to the client!

Wisconsin: Disbarment

A Wisconsin admitted lawyer practicing immigration law in Colorado was disciplined for failing to provide any meaningful immigration law services to numerous clients. In one case involving an "orphan" adoption, she did no work and refused to return the fee. In a removal case, she entered a Notice of Appearance, but did no work for a year and a half. After the client was arrested and deported, she filed a filed motion to re-open, which was granted, but she never prepared or filed appropriate papers to permit the client to re-enter the U.S. She essentially abandoned that client. In another removal case, she met with the client only four times over a two-year period, and abandoned the client prior to the hearing date, forcing the client to retain new counsel. In yet another removal case, although the lawyer appeared at the master hearing, she never filed an I-130 and she failed to advise the client that she was moving to another firm. This conduct was found to have violated Rule 1.3. The lawyer's same indifference to her clients manifested itself in the disciplinary hearing in which she did not appear and thus defaulted.[32]

Non-payment of Additional Fees: No Excuse

One of the immigration lawyers practicing before the Court of Appeals for the Second Circuit discussed above at p. 9,[33] offered as a defense to her failure to file briefs in numerous cases that her clients had stopped making fee payments. The Second Circuit rejected that explanation on the basis that a lawyer who decides she cannot pursue further action on a matter (for failure to pay the fee or any other reasons) either must move for permission to withdraw as counsel of record or withdraw the petition upon the client's consent, citing *Bennett v. Mukasey*, 525 F.3d 222 (2d Cir. 2008) which stated that

> a lawyer's practice of accepting an initial fee and then deliberately failing to take required action because of non-payment of additional fees, thereby permitting his client's petition to be dismissed is unacceptable.[34]

Because of special factors in mitigation, the lawyer was permitted to resign from practice before the Second Circuit without formal discipline.

While other circuit courts of appeal do not appear to have expressly addressed the ethical implications of allowing multiple defaults in a disciplinary context, there can be no ethical justification for essentially abandoning a client's matter. MR 1.16 sets forth the circumstances under which a lawyer

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[32] *People v. Hooker*, 318 P.3d 77 (Colorado 2013)(Wisconsin immigration lawyer who essentially abandoned clients and followed similar course of action by defaulting in disciplinary investigation, disbarred); *see also Cincinnati Bar Ass'n v. Sigalov*, 133 Ohio St. 3d 1 (Ohio 2012)(so-called work that Ohio immigration lawyer performed for clients, for example, filing "bare bones" motion consisting of nothing but three sentences, failing to resubmit a suitable motion timely and misrepresenting the status of matter, amounted to no work, as did failing to advise another client of hearing date and failing to request continuance when lawyer appeared without explaining client's absence, filing superficial deficient appeal to give appearance of diligent representation; and of course lying to client in violation of Rule 8.4(c), among others.

[33] *See In re Wang*, supra. (thirty-seven of sixty-two petitions filed by the lawyer were dismissed for failure to comply with scheduling orders). *See also In re Geno*, 997 A.2d. 692 (D.C. App. 2010)[among other things, lawyer claimed he was excused from filing an appeal of the *in absentia* deportation order (which resulted from his failure to appear at the correct immigration court and failure to advise client of hearing date) because the client refused to pay additional fees, court found lawyer violated D.C. Rule 1.3 (Diligence and Zeal), which differs from MR 1.3 by including an "intent" component.] *For discussion of State Rule Variations from MR 1.3 see pp. 27-30*

[34] 525 F.3d at 223.

is required to withdraw as counsel and those in which she may permissibly withdraw. But nothing in the rule or comments suggests or even implies that a lawyer may simply walk away from a case. In particular, MR 1.16 (c), provides that a lawyer may withdraw so long as he complies with applicable court rules. Prudent and conscientious immigration lawyers should check their home state's version of Rule 1.16, and the Immigration Court Practice Manual on withdrawal. 8 CFR §1003.17(b) provides that once a notice of appearance has been filed with the Immigration Court, an immigration practitioner may only withdraw or participate in a substitution of counsel upon an oral or written motion, which does not require a fee. The next AILA Ethics Compendium Report will comprehensively discuss MR 1.16 generally and as it applies to immigration lawyers.

Inadequate Investigation and Preparation

The requirement of diligent representation under MR 1.3 may overlap with MR 1.1 (competence) as it relates to the investigation of the facts of a case and preparation. In addition to diligent research of substantive law and careful marshaling of the facts, investigation and preparation may involve administrative matters that are nevertheless vitally important to diligent representation, as well. For example, when it is important to get in touch with a client to advise about an adverse decision in time to file a notice of appeal, inform the client of an impending hearing date or to discuss various remedies with a client who has been detained, diligent representation would require the lawyer to make all reasonable efforts to make contact with the client. Adequate preparation may also involve the careful attention to detail in assembling documents and meeting mailing requirements.

When Several Phone Calls Are Not Enough

Washington, D.C.: Public Censure

A Washington, D.C. immigration lawyer who failed to timely advise his client of the date of his merits hearing defended the neglect charge against him on the grounds that his office staff made many calls to the client up until about a month before the hearing date, but never reached the client. A day before the hearing, a letter was mailed to the client, but it did not reach him until hours after the hearing at which an in absentia deportation order had been issued. In the disciplinary action against the lawyer, the court rejected the lawyer's claim that he was diligent, observing that in light of the consequences to the client if he failed to appear "a few phone calls and one letter sent on the eve of the hearing did not constitute due diligence as required by [Wash. D.C. rules]."[35]

Promptness Yes, But Shortcuts Are Unacceptable

Washington: Disbarment

A lawyer's ability to generate work quickly is an important skill, but it is not enough when the quality of the work suffers or ethical shortcuts are taken. A junior Washington immigration lawyer learned this lesson the hard way. The named partner assigned a case to her on short notice, after a client's prior lawyer had asked the firm to file an ineffective assistance of counsel (IAC) claim against her. She conceded the IAC. The matter needed to be handled quickly because the client was on an "immigration hold" and was about to be deported to his home country. The junior lawyer immediately prepared a motion for leave to file a late appeal based on IAC. The BIA granted the motion and the lawyer filed the appeal but without ever contacting or consulting the client as to the appeal, alternate forms of relief, or the scheduling of a bond hearing. The junior lawyer also forged the client's signature

[35] *In re Geno*, 997 A.2d 692, 693 (D.C. App. 2010); *see also Matter of Farris, supra* (failure to update USCIS of client's status amounted to lack of diligence under Rule 1.3).

on a declaration and the notice of appearance, which she submitted to the court. The appeal was denied. The client retained new counsel who filed a motion to reopen based on IAC of both the prior lawyer and the junior lawyer. The new lawyer was able to obtain Temporary Protected Status (TPS) for the client and his removal case was administratively closed. In connection with the disciplinary complaint filed by the new lawyer, the junior lawyer was found to have violated Rule 1.3 on the basis that she never consulted directly with the client or scheduled a bond hearing.[36] She also was found to have lied to the disciplinary authority during the course of the investigation and to knowingly submitting forged documents to the BIA in violation of Rule 8.4 (c).[37]

Here, the consequences for the junior lawyer's negligent and dishonest conduct were dire. Despite the mitigating factors of inexperience and absence of prior disciplinary history, she was disbarred!

When Is Neglect (Lack of Diligence or Promptness) Malpractice?

As discussed, when an immigration lawyer neglects a client matter (or handles a matter without competence), she may find herself defending a malpractice action. Although the number of immigration malpractice cases filed each year is relatively low compared to other practice areas,[38] immigration lawyers who are negligent may be sued for malpractice whether or not the client files a disciplinary complaint or the lawyer is found to have violated Rule 1.3. For that reason alone, immigration lawyers should be mindful of Rule 1.3 even if only to help avoid malpractice.

To prove legal malpractice, in general, a plaintiff must:

- Prove a lawyer-client relationship existed between the plaintiff and the lawyer
- Establish the standard of care in the community (usually though the testimony of an expert witness)
- Prove that but for the defendant lawyer's negligence [deviation from the standard of care] the lawyer would have been successful in the underlying matter.[39]
- As in other legal malpractice claims, damages may be compensatory and punitive.

We discuss in more depth below the elements necessary to prove a malpractice claim and then discuss representative cases in which immigration lawyers were forced to defend legal malpractice claims because of alleged negligence. As a review of the malpractice cases discussed here will show, the primary issue is whether the lawyer's actions or inactions in a particular legal matter fell below the standard of care called for by the profession and that the lawyer's action or inaction that fell below the standard of care was the direct cause of the client's injury. However, there are times when the distinction between a lack of competence (under MR 1.1) or a lack of diligence (under MR 1.3) in a malpractice case may be blurred. Either way, we discuss malpractice cases here primarily to demonstrate the range of conduct that may trigger a malpractice claim. However, we believe that the disciplinary cases

[36] *In re R. Del Carmen Rodriguez,* 306 P.3d 893 (Sup. Ct. Wash. 2013).

[37] *Id.*

[38] According to *Profile of Legal Malpractice Claims, 2008-2012*, ABA Standing Committee on Lawyers' Professional Liability (Sept. 2012), at 5., the top five areas in which malpractice cases were filed between 2008 and 2011 were real estate (approx. 20%), personal injury (approx. 15%), family law (approx. 12%), trust and estate (approx. 11.5%) and collection/bankruptcy (approx. 9%). As for immigration malpractice cases, in 2007, there were 187 of 40,486 cases (0.46%) and in 2011, 405 out of 52, 982 cases (0.76%) While the figures for immigration malpractice cases are minute, by comparison, those numbers offer no comfort to any immigration lawyer who has to defend against a malpractice claim.

[39] *See, e.g., AmBase Corp. v. Davis, Polk & Wardwell*, 8 N.Y.3d 428 (2007); *Arnav Industries Inc. v. Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300 (2001).

discussed above provide a more comprehensive overview of the kind of conduct that may violate MR 1.3.

Necessity of Lawyer-Client Relationship

The first element necessary to establish a malpractice claim is a lawyer-client relationship. Ordinarily proving the existence of a lawyer-client relationship is straightforward where there is letter of engagement, a written retainer agreement or as is required in appearing before the USCIS or EOIR the filing of a notice of appearance. Like many contractual arrangements, a lawyer-client relationship may also be inferred from the circumstances. A lawyer-client relationship—current or prospective—may arise from online communication or by telephone conversations. Even where there is a written retainer, for immigration lawyers in particular who may be hired for a single matter, a prudent and conscientious lawyer must be mindful of clarifying the duration of the lawyer-client relationship. If there is any doubt, the immigration lawyer should take steps to remove it by re-confirming the relationship or advising the client that the lawyer-client relationship ended when the client obtained the relief sought—as in the case of a green card, for example.[40]

But For Causation

A lawyer may be found to have provided representation that falls below the standard care (and thus is negligent) and still defeat a malpractice claim. That is so because, as discussed, the plaintiff must not only show negligence, but also prove that but for the lawyer's negligence, he would have been successful in the underlying case. If the lawyer can show that the plaintiff would have lost the case regardless of the lawyer's conduct, the lawyer will be successful in defeating the claim. In that respect, a malpractice action is really a "case within a case" with the burden on the plaintiff to allege (and ultimately prove) that the underlying action had merit as a matter of fact and law.[41] As reflected in many of the cases we discuss below, the determination of whether the immigration lawyer's neglect was the cause of the adverse outcome or some other harm will turn on the opinions of experts as to the standard of care necessary for a particular form of relief. One court considering the issue of expert testimony in an immigration malpractice case stated the general proposition as follows:

> Unless a malpractice case turns upon matters within the common knowledge of laymen, expert testimony is required to establish the appropriate professional standard, to establish a deviation

[40] *Koch v. Pechota*, No. 10 Civ. 9152 (SDNY September 9, 2013)[get correct citation form](where immigration lawyer allegedly failed to remove conditions on client's green card and she was subsequently deported, lawyer's summary judgment motion rejected on grounds that there were unresolved factual issues as to the existence of lawyer-client relationship after green card obtained]. Notably, the same plaintiff several years earlier in *Koch v. Sheresky, Aronson & Mayefsky LLP*, 2009 N.Y. Misc. LEXIS 6033 (N.Y. Sup. Ct. July 13, 2009) brought a malpractice action against her husband's lawyer in a related divorce case based on a letter they had prepared providing information about obtaining a visa for the plaintiff ex-wife to come to the U.S. to complete the divorce action. She claimed that there was implied privity with her ex-husband and therefore had standing to bring the malpractice claim. The court rejected the argument. on the ground that the letter was sent to her lawyers only as a courtesy and was not intended to provide legal advice (to her or her husband), that she had her own counsel with whom she could have discussed the immigration issues and that, in any event, as a factual matter, the letter clearly stated that the information it contained had been provided by the immigration lawyer who had filed the ex-husband's marriage-based petition for a visa for the ex-wife in the first instance. On that basis, the court ruled there was no privity and thus she had no standing to bring a claim for negligence against the divorce lawyers who prepared the letter.

[41] *See Watson v. Bretz & Coven, LLP*, 2013 U.S. Dist. LEXIS 38758 (S.D.N.Y. Mar. 18, 2013) where citing clear precedent, the court opined that to demonstrate proximate cause [in a motion to dismiss for failure to state a claim], the plaintiff must plead facts that, if proven, demonstrate that he would have prevailed in the matter in question or would have at least achieved a more favorable result. *Reibman v. Senie*, 302 A.D.2d 290, 756 N.Y.S.2d 164 (1st Dep't 2003): *Pozefsky v Aulisi*, 79 A.D.3d 467, 914 N.Y.S.2d 15, 16 (1st Dep't 2010). In effect, a plaintiff must allege facts that lead to the plausible inference that he would have been successful in the "case within a case." *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 780 N.Y.S.2d 593, 596 (1st Dep't 2004). Failure to plead facts that demonstrate proximate causation "mandates the dismissal of a legal malpractice action, regardless of the negligence of the attorney." *Reibman*, 756 N.Y.S.2d at 164.

from that standard, and to establish that such a deviation was the proximate cause of the claimed damages.[42]

The Role of Experts in Immigration Malpractice Actions

Expert Cannot Help if Allegations Not Plausible

The role of the expert in an immigration malpractice action, as in others, is to evaluate the facts in the context of applicable law and the standard of care for the reasonable practitioner. Ultimately, the expert expresses an opinion on the merits of the client's position. But an expert's testimony is of no use if the plaintiff's allegations as to causation are out of touch with reality. Take the case of an immigration lawyer who was negligent in filing a late motion to reopen and with the wrong forum to vacate an in absentia deportation order.[43] The court dismissed the malpractice case on the pleadings based on a careful review the plaintiff's six previous failed attempts to re-open his case on the merits. The lawyer's failed motion at issue, filed at the direction of the client, had stated the same arguments that had been consistently denied, rather than the required new facts or law. Accordingly, the court found the plaintiff's allegation that but for the lawyer's negligence in improperly filing the motion he would have succeeded on the merits was not plausible and dismissed the case.[44]

Expert Cannot Help if Not Qualified to Opine on Ultimate Issue

Even when a plaintiff has alleged a plausible basis for recovery, she must be able to find an expert who is qualified to opine on the ultimate issue in the case. For example, in a malpractice suit based on an immigration lawyer's failure to file an appeal of the denial of a bond determination, the plaintiffs alleged that but for this failure, they would have been released from detention much sooner. However, because the defendant's lawyer established that plaintiff's expert had not sufficiently reviewed the factual record and was not familiar with the practices at issue, she was disqualified. Without the plaintiff's expert opinion, the court ruled that there was no evidence to dispute the defendant lawyer's contention that the plaintiffs would not have prevailed on appeal and thus had failed to raise a triable issue as to causation.[45]

Another malpractice case involving detention also demonstrates how important it is to have the right expert. A foreign national was detained upon entry to the U.S. at the airport because of a prior history of being unlawfully present in the U.S. Although he was released, he was put on notice that he would be subject to arrest and detention at a later time. In June 2005, five months after his release, the foreign national retained the defendant lawyer to file a joint motion to reopen his case. The lawyer waited until early September 2005 to file the motion, but in the meantime, the client was arrested and detained for five days. In the malpractice suit, the client alleged that the lawyer's delay in filing the joint motion was

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[42] *See Shortt v. Immigration Reform Law Institute*, 2011 U.S. Dist. LEXIS 114971 (E.D. Va. Oct. 30, 2011)(*citing Seaward Int'l, Inc. v. Price Waterhouse*, 239 Va. 585, 391 S.E.2d 283, 287, 6 Va. Law Rep. 2154 (1990); *see also Hatfield v. Herz*, 109 F.Supp.2d 174, (S.D.N.Y. 2000)(dismissing malpractice claim from coop board member alleging numerous and distinct instances of incompetence which were refuted by lawyer's documentary evidence and where plaintiff offered no expert testimony supporting deviation from standard of care).

[43] *Watson v. Bretz & Coven, LLP*, 2013 U.S. Dist. LEXIS 38758 (S.D.N.Y. Mar. 18, 2013) (dismissing complaint with prejudice because in light of the prior adjudications, the plaintiff would not be able to allege facts to support a *plausible* prima facie case of legal malpractice, *citing Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*(*To survive a motion to dismiss pursuant to *Rule 12(b)(6)*, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face").

[44] The Court stated the plaintiff "cannot demonstrate that any available new or old argument against removal would have likely prevailed" and that even though the plaintiff's plight over the years may evoke some sympathy, his complaint against his former attorney must be dismissed. *Id.* at 16.

[45] *Mirmehdi v. Ross*, 2008 Cal. App. Unpub. LEXIS 7848 (Cal. App. Ct. Sept. 16, 2008) (affirming dismissal of legal malpractice claim where law firm did not appeal adverse bond ruling by immigration judge because plaintiff could not have succeeded even if an appeal had been undertaken).

the but for cause of his five-day detention and he sought damages for emotional harm.[46] The plaintiff offered testimony from an expert which, to say the least, was not helpful. Upon questioning at his deposition about the filing of a joint motion, the plaintiff's expert expressed doubt that the defendant lawyer would have been able to obtain the necessary approval for the joint motion from the DHS lawyer. He also admitted that even if the defendant lawyer had succeeded in obtaining approval, the joint motion would not have automatically stayed the removal action or somehow suspended Immigrations and Customs Enforcement's (ICE) power to make an arrest. The plaintiff's expert also acknowledged that the client could have been arrested any time after he was initially released, because the arrest was ICE's independent decision under its mandate to enforce immigration laws.[47] Because the plaintiff could not prove that but for the lawyer's failure to file the joint motion he would not have been arrested, and detained, the court granted the defendant lawyer's summary judgment motion.

Counsel for Party May Not also Testify as Expert

In a malpractice action involving an employment-based residency application, a married couple alleged two separate theories of negligence. First, they claimed that their New York immigration lawyer was negligent when he wrongly filed the wife's labor certification application with the Legacy INS, rather than with the Department of Labor. By his doing so, the clients missed an April 30, 2001 deadline, which was required by the LIFE act.[48] They also claimed that the lawyer was negligent in not filing for the husband, a restaurant worker, given that the wife was employed as a babysitter and therefore had a weaker case. The husband introduced evidence, albeit disputed, that his employer would have been willing to sponsor him. They therefore maintained that the defendant lawyer was responsible for the resulting adverse consequences. The plaintiffs submitted an expert's opinion supporting their theory of negligence.

In a somewhat unusual strategy, the defendant's counsel, held himself out as an expert and submitted a reply affirmation essentially admitting that the wife's application for adjustment of status was weaker and a "long shot." Given the weakness of her case, the defendant's lawyer argued that the client could not prove that the defendant's alleged negligence caused the adverse consequences. As for the viability of the husband's case, the defendant lawyer offered factual evidence that the husband's employer was unwilling to sponsor him and therefore filing for the wife was the only option. The court noted that it was improper for defendant's counsel to submit evidence as an expert, but he did not preclude the opinion. He denied summary judgment on the basis of a conflict of the "experts" on the merits of the wife's labor certification application and what appeared to be conflicting factual testimony regarding whether the husband's employer had been willing to support the husband's application for adjustment of status. *See, e.g., Ertur v. Edward* discussed below at p ---- for another example of a malpractice case where defendant lawyer's "expert" opinion was struck because it created an impermissible conflict when the lawyer becomes a witness.

Representative Malpractice Cases

The most difficult part of a legal malpractice case is establishing causation. In most of the immigration malpractice cases discussed below, the defendant lawyers moved for dismissal on summary

[46] *Baserva v. Remes*, 2009 U.S. Dist. LEXIS 63597 (E.D. Va. July 23, 2009).

[47] *Id.* The court noted that at the plaintiff's expert's "deposition, he answered affirmatively that 'ICE retains the ability to detain and deport the immigrant under an order of deportation in absentia regardless of whether [a] joint motion was submitted.' When asked the follow-up question, 'So, the possibility is still there that [the plaintiff] would have been detained, regardless of whether the defendants submitted a joint motion,' the expert admitted that the 'possibility is there.'"

[48] *Ponce v. Howard Simmons, P.C.*, 2012 N.Y. Misc. LEXIS 4194 (N.Y. Sup. Ct. Aug. 30, 2012).

judgment on the basis that the plaintiff's underlying case would have been unsuccessful irrespective of the lawyer's alleged negligent conduct. In other words, there was no triable issue of fact as to causation.

Malpractice Based on the Lawyer's Judgment: Pushing the Envelope

One of the most difficult issues for an immigration lawyer involves the degree to which the lawyer should pursue a marginal theory of relief. In many cases, a client is so desperate to obtain permanent residency, she may plead with the lawyer to pursue any colorable but unlikely avenue of relief or even one that is certain to lose, but might afford the client more time in the country. In other cases, an immigration lawyer may truly believe that an adverse majority view of a certain issue is simply wrong and may try to make new law, so to speak, in the service of helping the current client and future clients as well. As discussed above, what constitutes diligent or zealous representation depends on the circumstances. An important consideration in determining if a lawyer's failed strategy amounted to negligence is whether the lawyer has fully explained the risks associated with pursuit of a certain course of action as well as a full discussion of any alternatives that may have a better chance of success. Consider the malpractice actions against a New York immigration lawyer, a Wash. D.C. immigration lawyer, and a Washington immigration lawyer below.[49]

New York - Against the Odds:

After previously being deported following a removal order entered in May 1999, a foreign national re-entered the U.S. without inspection in December 2000. She then lived in the U.S. unlawfully without incident for six years. In 2006, she married U.S. citizen (who happened to be a lawyer) and retained the defendant lawyers. They determined she could apply for adjustment of status, based on her marriage, without leaving the U.S. However, this theory was inconsistent with all the circuit courts of appeal who had considered the issue, except the Ninth Circuit.[50] Under the majority view, which had also been adopted by the BIA, the wife was inadmissible because she did not qualify for a waiver of inadmissibility [as set forth in section (a)(9)(C)(ii)] because ten years had not yet passed from the date of her last departure from the United States, and she did not seek permission for readmission before she reentered in December 2000.

The defendant lawyers filed the appropriate applications with the USCIS, which included an application for a "waiver of inadmissibility" and the client and her husband appeared for the required interview. The USCIS denied the applications that day on the basis that the wife was ineligible to file for adjustment of status under existing law. As a result, the USCIS reinstituted the May 5, 1999 removal order subjecting the wife to deportation. The defendant lawyers filed a petition for review with the Second Circuit and at oral argument relied in part on the Ninth Circuit case. While the matter was before the court, the Ninth Circuit overruled the decision on which the defendant lawyers had relied. Shortly after, in early 2008, the client terminated the lawyers and substituted her husband as counsel. Weeks later, the Second Circuit rejected the petition.

The client commenced the malpractice suit in late 2010, four years after she had initially sought permanent residency. She contended that the lawyers were negligent by failing to adequately advise her of the adverse consequences of applying for adjustment of her immigration status through marriage, given that she had entered the U.S. illegally after being ordered removed. She alleged that the misguided advice was the but for cause of her being taken into custody and deported. The trial court hearing the

[49] *Delgado v. Bretz & Coven, LLP*, 109 A.D.3d 38 (N.Y. App. Div. 2013).

[50] *Perez-Gonzalez v Ashcroft* (379 F3d 783, 788-789 [9th Cir 2004]) *(*minority opinion which contradicted decisions in seven circuit courts and whose holding had been officially rejected by the BIA on other occasions).

case granted the defendant's motion to dismiss the legal malpractice claim, noting that (1) the retainer agreements referred to the "difficulty" of the client's position and warned of a "harsh legal environment" and (2) that the passage of time and intervening events precluded a finding that the lawyer's representation was the "but for" cause of her deportation.

On appeal, the Appellate Division, First Department disagreed with the trial court by first observing that it was the defendant lawyer's submission of the application for permanent residency that alerted the immigration authorities that the wife was in the U.S. illegally and which lead to the reinstatement of the removal order and her ultimate removal. As to the question of whether the lawyers provided adequate legal advice, the court cited to an alternative form of relief they characterized as available if the client had waited four more years. The court stated that the client then could have applied for legal status based on the passage of ten years from the date of her last departure.[51] The Court found that the defendants unreasonably relied on the fact that the Ninth Circuit case had not been overruled at the time they submitted the client's residency application, notwithstanding that the case was inconsistent with the decisions of seven other circuits, and that the BIA had already announced it would not follow that decision.[52]

While it is hard to predict if the plaintiff will be successful if the case goes to trial, the summary judgment decision suggests that lawyers in similar situations might able to protect themselves in a malpractice claim if they are very specific in spelling out the risks associated with filing applications that alert the USCIS to a client's unlawful presence in the U.S. where, as was the case here, the theory of relief had been rejected by the BIA and a significant number of circuit courts. The lawyer would need to explain the benefits and risks associated with their proposed strategy as well as the benefits and risks associated with any viable alternative strategies. In such instances, prudent and conscientious immigration lawyers should memorialize the client's consent to the strategy in writing and, if possible, after the client has consulted with other immigration counsel.

When to Move for Reconsideration

In another malpractice action based on the defendant's lawyer's alleged unreasonable reliance on a particular strategy, the lawyer was able to defeat the plaintiff's motion for a partial judgment notwithstanding the verdict, primarily because of her expert's testimony.[53]

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[51] Plaintiff had alleged in the complaint that the defendant lawyers had failed to advise her that if she were going to pursue such a "risky" application, she ought to have waited until ten years had passed from the date of her last departure from the United States, in light of the statutory language and the relevant law. The plaintiff alleged that if she had waited the ten years, there would be no need to file a waiver of inadmissibility because under the law, she would be admissible**.** The court also misunderstood that the client could apply for a waiver of the bar under §212(a)(9)(C)(i)(II) within the United States after 10 years, which is clearly not the case. This case reminds us that a civil court not specialized in immigration issues may misunderstand the complexity of the immigration matter in ruling in favor of the plaintiff who is seeking damages for an adverse action taken by the government.

[52] *Id.* The Court noted that when

> "defendants submitted plaintiff's application, the government had already publicly announced that it would not grant relief to those in her position in light of the BIA's decision in *Matter of Torres-Garcia* (*see, e.g.,* CIS Interoffice Memo dated Mar. 31, 2006, p. 2, attached to the complaint and *available at http://www.uscis.gov/USCIS/Laws/Memorand.a/Static_Files_Memoranda/Archives%201998 -2008/2006/perezgonz033106.pdf*, stating that in light of *Torres-Garcia,* 'in any case where an alien is inadmissible under section 212(a)(9)(C)(i) of the INA and 10 years have not elapsed since the date of the alien's last *departure* from the United States, USCIS should deny any Form I-212 requesting consent to reapply **...** for admission'").

[53] *Liu v. Allen*, No. 03-CV-263 (D.C. Ct. of Appeals, argued Jan. 25, 2005- Mar. 16, 2006) (court found that although there were instances in which direct violation of a statute could constitute evidence of negligence, jury's finding that in this instance defendant's violation of 8.CFR §106.5(a) did not constitute negligence "was not so clearly against the weight of the evidence presented at trial"). This case is also discussed in the Ethics Compendium on MR 1.1 (competence).

A Washington D.C. immigration lawyer had filed an adjustment of status application for a spouse who was present in the U.S. on a visitor's visa. At the couple's interview, the adjudication officer raised some questions about the spouse's residence and her intention to come to the U.S. Subsequently, the Legacy INS issued a letter denying the application on the ground that her client had a "preconceived intent to immigrate" when she had previously applied for a temporary visitor's visa and "therefore misrepresented a material fact to procure that visa." The denial letter invited the client to show why her employment authorization linked to the adjustment application should not be revoked. After reviewing the letter, the lawyer realized that the INS had misread the application and thus based its decision on erroneous facts. The lawyer decided based on her knowledge and experience to write back promptly to the INS to outline the factual errors, rather than filing a formal motion for reconsideration.[54]

About a month later, the lawyer received a form letter from the INS suggesting that she file a motion for reconsideration under immigration regulations that required payment of a filing fee. A few weeks later, the lawyer wrote to the INS requesting that her letter be treated as a motion for reconsideration and she enclosed the filing fee. The INS dismissed the "motion" as "untimely" and also revoked the client's employment authorization. Because the clients were able to re-file the application, eventually they were able obtain their green cards.[55]

At that point, they filed the malpractice action. Experts testified on both sides. The defendant lawyer's expert supported the theory that filing a motion for reconsideration was only one of a few different options for dealing with the INS's obvious error, because an "informal approach is often more effective than a formal motion." He stated that "INS officers are willing and able to reverse adverse decisions on their own initiative, without a formal motion, when an obvious error is brought to their attention."[56] The client's expert disagreed, testifying, in essence, that the prevailing standard of care requires that a reasonably competent lawyer preserve a client's procedural rights even if there are other informal methods to persuade the INS to correct an obvious error. The court determined that the conflict "between qualified and competent experts on this central point was substantial enough to preclude a determination that [the lawyer] was negligent as a matter of law."[57]

In this case, the lawyer took a chance by relying on the informal letter while the time for filing a motion (within 30 days) was slipping by. Apparently, the jury agreed with her expert that it was reasonable for her to assume, based on what she knew about the decision making process, that dealing with the problem informally would best serve her clients. The jury may also have concluded that the INS was unreasonable. Here, the lawyer had a more than a justifiable rationale for her conduct that was supported by an immigration expert. In contrast, a lawyer's out-and-out failure to file papers in accordance with immigration regulations or court-ordered deadline, where there is no practical alternative to or any reasonable justification for such failure, is more likely to result in a finding of malpractice.[58]

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[54] 8 CFR §106.5(a)(1) sets forth the procedures for filing a motion for consideration. Sub-section (i) requires filing within 30 days of the decision at issue and sub-section (a)(4) provides that a "motion that does not meet applicable shall be dismissed."

[55] The lawyer had offered to re-file the application free of charge, but the clients apparently had lost confidence in the lawyer, and decided to retain other counsel.

[56] *Liu v. Allen*, *supra*, at 457.

[57] *Id.* at 460.

[58] *See Jansz v. Meyers*, Slip Op. No. 109162/2009 (Sup. Ct. April 08, 2010)(where lawyer conceded unjustified failure to file H-1B application timely to obtain an E-2 Visa designed to override the client's overstay status which was denied, client's motion for summary judgment on liability granted).

Failure to Pursue Alleged Alternative Avenue of Relief

A foreign national had been ordered removed after a failed attempt to obtain residency through marriage. Among other reasons for the adverse result was that his wife had withdrawn her support for the application accusing the client of abuse. In his attempts to re-open the case, the husband had retained two different lawyers, each of whom was unsuccessful in reversing the order of removal. The first lawyer filed a writ of habeas corpus to stay the order of removal, but withdrew from the representation after the client filed a disciplinary complaint against him because he filed the petition late.

The second lawyer, after investigation, advised the client that he was not eligible to stay in the U.S. and recommended he accept voluntary departure. Unhappy with that recommendation, the client terminated the second lawyer and hired a third lawyer [against whom he ultimately filed the malpractice action (the defendant lawyer)] to assist him in prosecuting the habeas corpus motion and she filed a notice of appearance. In the reply papers, the defendant lawyer raised the issue of ineffective assistance of the first lawyer on the basis that he missed an appeal deadline by one day causing the appeal to be dismissed. That argument was struck because it was raised for the first time in the reply when it should have been raised in an amended habeas petition. The relationship between the client and the third lawyer then deteriorated because the client had failed to inform her of information material to his case, *i.e.*, he had a past history of abuse against former wives and a niece. He also had failed to pay her fee. The court eventually permitted her withdrawal on the basis that the client would be proceeding pro se, but he later engaged his divorce lawyer to continue assisting him.

The client brought a malpractice suit against the defendant lawyer claiming that she was negligent during her four-month representation because she failed to seek relief for the client as an abused spouse or suggest the possibility of bringing a claim for relief under VAWA (Violence Against Women Act) on the basis that the husband was the victim of domestic violence.[59] The client claimed that he could have raised a VAWA claim in the one-year period following the court's dismissal of his appeal, including the four-month period in which the defendant lawyer represented him. He was represented by his divorce lawyer in the malpractice action.

In support of his malpractice theory, the client asserted in his response brief that the lawyer "was told of the abuse [the client] had endured by his wife," and that she was aware that the client's former wife had filed fraudulent documents to the Legacy INS to support his deportment. However, the client failed to name anyone who allegedly told the lawyer. The defendant lawyer stated that she was never told about the client being a victim of abuse. As to the viability of a VAWA claim in any event, the defendant lawyer stated she believed that it would not have been successful because "other women, including his wife, had obtained restraining orders against [the client]."

In an effort to establish that there was a triable issue of fact as to the VAWA claim, the client offered an "expert" report prepared by his own counsel which claimed there was "lots of evidence" to prove that the client was the victim of abuse about which the defendant lawyer had shown no interest. He also averred that he had told the defendant lawyer that there was a significant amount of evidence to support that claim. The court however found these statements unpersuasive since there had been nothing in the record to support those assertions.

More importantly, the court explicitly criticized the plaintiff's lawyer for holding himself out at the expert noting that he not only violated the state's rule concerning a lawyer as witness, but also "failed to serve the best interest of his client, who may have benefitted from a third-party expert." The court struck

[59] *Ertur v. Edward*, 2007 U.S. Dist. LEXIS 21401 (W.D. Wash. Mar. 22, 2007).

the "opinion" and directed the defendant's counsel not to charge his client any fees for preparation of the so-called expert report.[60]

Noting that the burden was on the plaintiff to prove that he would have been successful if the defendant lawyer had pursued a residency claim under VAWA, the court observed that since the client had produced no such evidence—even after four years of claiming it was a viable claim, no jury would agree that he had had a viable VAWA based on nothing more than "vague allegations." Based on the plaintiff's failure to offer the court sufficient, admissible evidence of the defendant lawyer's alleged breach of her duty of care, the court granted the defendant's motion for summary judgment.

Damages

As in the case of other malpractice actions, a plaintiff may be awarded compensatory damages and even punitive damages.

Lost Income and Misrepresentations

In a malpractice action against a New York immigration lawyer, it was undisputed that the lawyer failed to timely file for an extension of his client's H-1B visa and for an employment based-residency application. It was also undisputed that the lawyer lied to the client to conceal the misconduct.[61] As a result of the lawyer's neglect, the client lost his legal status and his job. As to compensatory damages, here the client's lost income, the defendant lawyer argued, among other things, that the client was not entitled to the equivalent of his salary because he had not taken any steps to mitigate the damages by looking for other work. However, because the defendant lawyer had offered no evidence to support that assertion, the court held that he failed to meet his burden of proof as to failure to mitigate loss of income and awarded the client the full amount of his salary of approximately $110,000 plus pre-judgment interest. More importantly, because the lawyer had admittedly lied to the client to conceal his misconduct, the court awarded the client punitive damages in the amount of $25,000 plus interest.

It should be noted that the same lawyer had been unsuccessful in defeating a summary judgment motion on liability a year earlier, where the lawyer had admitted in a submission to immigration authorities that the client "should have had the H-1 extension . . . but for [his] failure to timely file").[62]

Apparently, a number of the same lawyer's clients in other matters filed complaints with the disciplinary authorities. After a hearing, the court imposed a two-year suspension from the practice of law.[63]

Clean Hands Required

In what can only be described as the height of audacity (sometimes referred to as "chutzpah") an undocumented foreign national who gained employment using a false name furthered his fraudulent conduct by attempting to obtain workers compensation (WC) benefits. When his lawyer missed the statute of limitations to file the WC claim, he brought a malpractice action against his counsel based on

[60] *Id.*

[61] *Kuruwa v. Meyers*, 823 F. Supp. 2d 253 (S.D.N.Y. 2011)(where lawyer defaults in answering allegations as to liability, only remaining issue is damages).

[62] *Jansz v. Meyers*, 2010 N.Y. Misc. LEXIS 1706 (Apr. 8, 2010) (granting plaintiff's motion for summary judgment on the issue of liability where lawyer admitted his that he had missed filing deadline).

[63] *Matter of Meyers*, 108 A.D. 3d 158 (1st Department 2103)(notwithstanding certain factors in mitigation, including treatment by psychologists and psychiatrists for depression, cardiac problems, care of his 90-year old mother, financial responsibility for college tuition for two children, remorse and changes in office procedures and support services, because the lawyer engaged in misrepresentations to cover his neglect and had a prior disciplinary history, he was given a two-year suspension).

negligence.[64] The lawyer moved for summary judgment on the grounds that the plaintiff could not prove that he would have been successful but for the lawyer's failure to file the claim timely. Apparently, the foreign national had overstayed his visa. Under Virginia WC law he would not have been deemed an "employee" and therefore would not have been entitled to workers compensation in the first instance.

Special Areas of Concern

Ineffective Assistance of Counsel Claims: Criminal and Immigrations Cases

In the criminal context, negligent representation may lead to a violation of the client's Sixth Amendment right to effective assistance of counsel.[65] But the elements of a lawyer's conduct which support an ineffective assistance of counsel claim (IAC), under applicable federal and state law in criminal matters, may not be the same as and, accordingly, may not amount to a violation of MR 1.3[66] That same rationale applies to immigration lawyers. As most immigration lawyers who handle deportation cases know, under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), a foreign national is also entitled to effective assistance of counsel, but on the basis of the Fifth Amendment due process right to a fundamentally fair hearing .[67] Under *Lozada*, a foreign national making an IAC claim in support of a motion to reopen is required to inform the former lawyer of any IAC allegations to allow her the opportunity to respond and also reflect "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not."

For that reason, many immigration lawyers may be exposed to the potential for discipline based on a violation of MR 1.3.[68] The nature of such IAC claims may be the lawyer's failure to advise the client of a hearing date resulting in an absentia order of removal, the failure to file court papers timely resulting in denial of a claim for relief, or the failure to adequately explain the ramifications of pursuing a particular strategy, among others. While a lawyer who is the subject of an IAC claim in a motion to reopen is not required to submit a response, she is ethically obligated to answer a disciplinary complaint and the failure to do so would be independent grounds for discipline. There may be times when the only way a lawyer can successfully defend against an accusation of IAC is to reveal client confidential information, which is permitted under one of the exceptions to the general proscription against revealing confidential information under MR 1.6. For a fuller discussion of the circumstances under which a

[64] *Marboah v. Ackerman*, 877 A.2d 1052 (D.C. 2005).

[65] *Strickland v. Washington*, 406 U.S. 668 (1984) (Sixth Amendment right to effective assistance of counsel is violated when defendant's counsel makes serious errors amounting to a deprivation of competent counsel which result in prejudice to the defendant).

[66] *In re Wolfram*, 847 P.2d 94 (Ariz. 1993)(while IAC may be sufficient to trigger disciplinary inquiry it does not necessarily equate to a violation of ethical rules).

[67] *See Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), even though the BIA acknowledged no constitutional right to counsel, it still affirmed *Matter of Lozada* as a right to a fundamentally fair hearing under the Fifth Amendment's Due Process clause, and IAC is a violation of due process. *See also Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007); *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Contreras v. Attorney General*, 665 F.3d 578 (3d Cir. 2012); *Denko v. INS*, 351 F.3d 717 (6th Cir. 2003); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855 (9th Cir. 2004); *Osei v. INS*, 305 F.3d 1205 (10th Cir. 2002); *Dakane v. United States AG*, 399 F.3d 1269 (11th Cir. 2004).

[68] Lawyers should be aware that there are discrete bases in the immigration law in addition to *Lozada*. For example, 8 CFR §§1208.4(a)(5)(iii) and 1208.4(a)(5)(iii) incorporate the *Lozada* standard. Under this rule which concerns asylum applications, a client who missed the one-year filing deadline because of the alleged action or inaction of an immigration practitioner and seeks permission to file it out of time (based on certain exceptions) is required file a complaint with the appropriate disciplinary authority or explain why none is being filed. Also, under section 3 of the Child Status Protection Act, codified at INA 203(h)(1)(A), the child must have sought to apply for permanent residency within one year of visa availability. In *Matter of O. Vasquez*, 25 I&N Dec. 817 (BIA 2012) the Board of Immigration Appeals held that one way to show that an applicant met the requirement, even if the application was not filed within one year, was that he or she paid a lawyer to prepare an application prior to the one year deadline, but the lawyer then failed to take the ministerial step of actually filing the application, thus effectively depriving the aged out child from the protection of the CSPA for no fault of its own.

lawyer may reveal confidential information when defending against allegations of wrongdoing, *see AILA Ethics Compendium*, MR 1.6 Confidentiality of Information.

Immigration Consequences of Criminal Convictions

One area of an IAC of which both criminal and immigration lawyers must be aware concerns a lawyer's advice to a defendant in a criminal matter as to the immigration consequences of taking a plea to a particular crime. This issue was addressed in *Padilla v. Kentucky*, 559 U.S. 356 (2010), where the Supreme Court held that a lawyer's failure to advise the client about whether his guilty plea would expose him to automatic deportation rose to the level of ineffective assistance warranting remand of his case. The defense lawyer in *Padilla* does not appear have been sanctioned by any disciplinary authority as a result of the IAC finding. After *Padilla*, a lawyer must be diligent in researching the question of whether a crime to which his client may plead is a deportable offense or risk not only a finding of IAC, but also a finding of negligence (and/or incompetence) given the widespread knowledge of *Padilla*. It goes without saying that any immigration lawyer consulted by criminal counsel, or who represents the client in the criminal matter himself, must be equally sure that his advice is based on a sufficient understanding of the plea and the most thorough and timely research of applicable immigration law. For discussion of IAC claims that may involve competence under MR 1.1 *see* Ethics Compendium Module 3 at pp.-

Special Criteria for Malpractice in Criminal Matters

As discussed above, criminal defendants may allege that they received ineffective assistance of counsel in order to vacate their conviction based on incorrect advice as to the immigration consequences of the plea. While most criminal defendants would be satisfied enough if they were successful in proving ineffective assistance of counsel based on incorrect plea advice, some criminal defendants commence malpractice suits against their lawyers on the same grounds. In such cases, the claim would be that but for the lawyer's incorrect advice as to the immigration consequences of the plea, the client would not have suffered the injury of deportation. However, under statutory rules or common law, a formerly convicted criminal defendant is precluded from bringing that type of malpractice claim unless she is able to show that the underlying criminal conviction to which she pleaded guilty has been overturned. The rationale for the law is that it is the criminal defendant's illegal conduct that caused the injuries that resulted from the conviction—*i.e.*, deportation—not the lawyer's negligence.[69]

In one malpractice case involving a guilty plea, a Canadian national sought damages based on the defendant lawyer's advice that pleading guilty to conspiracy to sell drug paraphernalia would not result in deportation. However, after pleading guilty, the client was incarcerated for five months and then deported to Canada. In the suit, the client contended that if her lawyer had not given her incorrect advice she would not have pleaded guilty and would not otherwise have been deported. The court dismissed her suit under Florida law which provided that a malpractice claim based on a criminal conviction may not go forward unless the conviction is overturned. The Court wrote that the

> settled law of Florida, in accordance with the majority view throughout the country, is that a criminal defendant who is convicted may not maintain an action against his or her attorney for legal malpractice that resulted in the entry of or failure to vacate the criminal conviction, unless and until the conviction is vacated, either on direct appeal or collateral review.

[69] *Georganas-Kesselman v. Sheppard*, 2002 U.S. Dist. LEXIS 28417 (N.D. Fla. Mar. 27, 2002).

In another malpractice case based on a criminal plea,[70] the client had been represented by the defendant lawyer in connection with a domestic violence crime. Based on the lawyer's incorrect advice that the crime was not a deportable offence, the client pleaded guilty and was then placed in deportation proceedings. The client then hired new lawyers who were successful in moving to invalidate the conviction on grounds of that but for the defendant lawyer's advice the client would not have pleaded guilty. (In essence, this was an IAC claim.) Based on his new lawyer's advice that the lesser crime of assault was not a deportable offense, the client pleaded guilty and he was given a deferred sentence. However, contrary to the new lawyer's advice, the assault crime also turned out to be deportable offense and the client was placed in deportation proceedings. Presumably, based on the fact that his first conviction had been invalidated, the client commenced the malpractice suit. However, under circumstances in which the Legacy INS stated that the pending deportation proceedings for the plaintiff were not based on the first criminal matter, the client was unable to show that the defendant lawyer's incorrect advice in that matter caused him to be deported. The court concluded that the client bore responsibility for his deportation since he was the one who committed the deportable crime. Notably in this case, the matter was decided under common law because Montana state law did not have a special statute barring legal malpractice claims arising from criminal convictions, relying instead on the policy considerations in an analogous Oregon case.[71]

In a malpractice case, not based on incorrect advice, the client sought damages for his arrest and incarceration.[72] The client had retained the defendant lawyers to help him obtain permanent residency through what appears to have been a marriage-based application.[73] At the time of the retention, the husband was in the U.S. illegally having re-entered the U.S. without inspection. After the appropriate papers were submitted, the Legacy INS became aware of the husband's whereabouts and scheduled an interview with him. At that interview, which the lawyer attended, the husband was notified that his application to register for permanent residence would likely be denied. He was later arrested and charged with Illegal Reentry under 8 USC §1326 and to which he pleaded guilty.

Although the conviction occurred in immigration court, the federal court hearing the malpractice suit determined that Texas law, which prohibited recovery on a malpractice claim if the underlying conviction had not been overturned, applied. Here, the client had alleged that in the course of seeking permanent residency through marriage, the lawyer's apparent failure to file an application for a waiver of admissibility (Form I-212) was the cause of his incarceration. The court rejected that argument reasoning that the filing of Form I-212 would not have guaranteed that the waiver would have been granted and that the waiver was a prerequisite to the granting of any residency application based on marriage. The court found that the plaintiff was incarcerated because he pleaded guilty to a charge of illegal reentry, which could not be disputed. His incarceration was not caused by any alleged mistake or negligence on the part of the defendant lawyers. The court therefore granted the defendant lawyer's motion to dismiss on the grounds that the plaintiff could not as a matter of law prove causation.

Neglect and Mental Health/Substance-abuse issues; Lawyer's Assistance Programs

Three disciplinary cases discussed below illustrate what many lawyers already understand. They, like the general population, may suffer from depression and other psychological impairments that necessarily impact their ability to provide clients with proper representation. A lawyer's psychological

[70] *Fang v. Bock*, 2000 ML1730 (Mont. Dist. Ct. 2000).

[71] *See Stevens v. Bispham*, 851 P.2d 556 (Or. 1993).

[72] *Alvarez v. Casita Maria, Inc.*, 269 F. Supp. 2d 834 (N.D. Tex. 2003).

[73] The decision does not specifically identify the type of "forms" submitted by the defendant lawyers.

impairment or substance addiction may manifest itself as general procrastination, difficulty in making decisions, or inability to manage cases and supervise staff. For that reason, every state bar offers a confidential lawyer's assistance program (LAP) free of charge to help lawyer's grapple with alcoholism and other substance abuse, depression, stress or other mental health issues.[74] All lawyers, including those that practice immigration law, who feel burned out or are unable function on a day-to-day basis should consider reaching out to the local LAP representative for an evaluation or counseling. The failure to do so over time may result in the breakdown of the lawyer's law practice or a disciplinary investigation, and it will create serious problems for the lawyer's clients. The consequences for immigration clients, for instance, may include removal to a country they fled because it was too dangerous for them to live there.

Take the case of a Minnesota lawyer who was found to have neglected several different types of matters, among them, an immigration matter. An Ethiopian foreign national with a visa due to expire in one month, retained the lawyer to represent him in a petition for asylum, having been placed on "voluntary departure status" by the Legacy INS. The lawyer assured the client that he would take care of the matter, but did not respond to the client's numerous calls. When he did respond, the lawyer lied to the client saying that the petition had been filed, when it had not, and blamed the delay in resolution of the matter on legacy INS. At his disciplinary hearing, evidence was credited that the lawyer had been suffering from a severe depression disorder for years, which contributed to the ethical violations. On the basis that the lawyer had been making progress under his doctor's care, had decreased his caseload, and accepted the findings of misconduct, the lawyer was placed on a short probation, agreed to be supervised by a monitor and to take other steps to maintain a proper practice for a period of two years.[75]

In another case, a Rhode Island lawyer, who suffered from depression, had claimed she had filed a family-based permanent resident application. However, despite the family's attempt to ascertain the status of the application for over a year, the lawyer failed to take steps to determine if the application had been received. When the Legacy INS showed no record of receiving the application, the lawyer failed to file a second application. The lawyer also engaged in neglect of a divorce matter. The court found that the lawyer's conduct violated Rule 1.3 (and Rule 1.4 in the second matter). As to the sanction, the lawyer acknowledged her misconduct and expressed regret. She also presented evidence that she had been under medical treatment for depression and attention deficit disorder. There was also evidence that the lawyer was working well with a "monitoring" lawyer. As a result, the court issued a public censure subject to continued monitoring and compliance with the court's directive of continued medical treatment.[76]

In a third case, an Ohio immigration lawyer engaged in neglect by refusing to turn over the client's file to her new counsel, after she had filed an appeal late, albeit by only one day. The lawyer was also in the process of being evicted. In that action the lawyer included the CIA, the FBI and Radio Martinique as third-party plaintiffs. In connection with the disciplinary investigation, staff counsel spoke with the lawyer about concerns that she was having mental health problems and recommended that the lawyer contact Ohio's Lawyer's Assistance Program (OLAP). Although the lawyer agreed, she never did.

[74] The ABA provides a directory of state lawyer's assistance programs which may be found at [*http://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/colap_directory.html*]; *See also* MP McQueen, The Am Law Daily, "More Lawyers Asking for Help for Alcohol, Drug Abuse," [*http://www.americanlawyer.com/id=1202663819141/More-Lawyers-Asking-for-Help-for-Alcohol-Drug-Abuse#ixzz38y7AfzhH*] and California Lawyer Assistance Program [*http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx*]; New York Lawyer Assistance Program [*http://www.nysba.org/LAP*].

[75] *In re Smith*, 381 N.W.2d 431 (Sup. Ct. Minn. 1986).

[76] *In re Cooney*, 868 A.2d 656 (Sup. Ct. R.I. 2005).

Thereafter she refused to cooperate with the disciplinary authorities and was held in default. The court suspended the lawyer indefinitely, ruling that if the lawyer applied for reinstatement she would have to provide proof from any treating medical professionals and OLAP that she had received assistance and was fit to return to the practice of law. In this case, the lawyer had apparently failed to recognize her impairment and lost the ability to practice law as a result.[77]

In the above cases, two of the lawyers affirmatively raised and provided proof of their psychological problems which resulted in a more lenient sanction.[78] In both cases, the lawyers had already recognized their problems and took appropriate actions to avoid future ethical lapses. However, as in the last case, there are many lawyers who are either too impaired or too embarrassed to acknowledge that they need help. For some, a disciplinary investigation may be a sufficient wake-up call and they may seek help. For others, who do not seek help or are otherwise not able to manage their impairment, the result may be the loss of a legal career.[79]

Heavy Caseloads

Lawyers who have heavy caseloads may not be able to manage their time in a way that permits diligent representation. They may not employ adequate calendaring systems or lack the resources to use them properly. Absent proper safeguards, lawyers with heavy caseloads are more likely to miss agency or court deadlines and less likely pay adequate attention to their clients' matters. For example, the Washington D.C. immigration lawyer, discussed above who was disciplined for missing agency filing deadlines in labor certification matters, did not maintain any calendar system to record due dates, despite a heavy caseload.[80]

Three immigration lawyers, discussed above, who were the subject of discipline by the Second Circuit, had filed an exceedingly high number of petitions for review, many of which were dismissed for failure to submit briefs timely.[81] In part, because of the lawyers' respective heavy caseloads, the briefs that were timely submitted were found to be poorly written and lacking in substantive arguments and support. For example, the court criticized one lawyer's brief for "making bald assertions without any evidentiary support" and one argument about one claim "contained only a heading."[82]

A lawyer may have many clients, but when it comes to a given matter, the client depends on one lawyer. As discussed in Chapter 3, MR 1.1, it is difficult to provide competent representation when a lawyer has too many cases and not enough resources to handle them. The same applies to providing diligent and prompt representation.

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[77] *Disc. Counsel v. Meade*, 127 Ohio St. 3d 393 (Ohio 2010).

[78] However, the mere assertion of depression, medical issues or personal problems without evidence to substantiate the claims would not amount to mitigating evidence, since the burden of proof lies with the respondent lawyer. *See, e.g., In re Karlsen, supra,* note ---.

[79] *See, e.g., In re Allen*, 286 Kan. 791 (Kan. 2008)(after receiving ten years of treatment for pos-traumatic stress syndrome (severe depression and anxiety, among other things) which interfered with the immigration lawyer's ability to properly deal with clients and function in court proceedings, lawyer abruptly abandoned practice; lawyer indefinitely suspended but ordered to take appropriate measures to go though his cases to permit appropriate resolution of matters).

[80] *In re Ryan, supra.*

[81] *See In re Wang, supra (*permitted to resign*) In re Mundie(*public reprimand as well as strict two-year reporting requirements and CLE in Office Management*)* and *In re Guttlein, supra* (public reprimand by Second Circuit; subsequent public censure by New York employing doctrine of reciprocal discipline).

[82] *In re Wang, supra*.

Delegation

A lawyer's obligations under MR 1.3 (or for that matter all of the Model Rules) may not be avoided by delegating work to other lawyers or nonlawyers. MR 5.1 and MR 5.3 speak directly to this issue.[83] Under MR 5.1, a lawyer with supervisory authority over another lawyer is required to employ reasonable efforts to make sure that the supervisee lawyer complies with the rules of professional conduct. The supervising lawyer will be held responsible for the other lawyer's violation of a rule, if she fails to take steps to avoid or mitigate the consequences of any failure to comply.[84] Under MR 5.3, supervisory lawyers may be liable for violations of ethical rules by their nonlawyer supervisees as well.[85]

A Washington, D.C. Immigration lawyer, discussed above at ------, was found to have violated MR 1.3 based on the conduct of his nonlawyer legal assistant whom he asked to locate the client to advise of the next court appearance.[86] The legal assistant allegedly called the client many times over a several week period but never reached the client. After taking no action for almost a month thereafter, a letter was mailed to the client, which arrived too late. The lawyer was not charged with violating MR 5.3, but he appears to have violated the rule nevertheless, since there was no evidence introduced that the lawyer was directly involved in trying to contact the client or that he had even checked with the nonlawyer as to his progress in reaching the client.

A California lawyer, discussed above at ----, practicing immigration law in Nevada was found to have violated Rule 1.3 when he missed the deadline for filing an appeal. The lawyer had delegated responsibility for the appeal to his secretary who not only prepared the motion but also signed the

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[83] Under MR 5.1 and MR 5.3, supervisory lawyers may be liable for violations of ethical rules by their supervisees. *See, e.g., Mays v. Neal* 938 S.W.2d 830 (Ark. 1997) (while a lawyer may delegate certain tasks to his assistants, as supervising lawyer he has the ultimate responsibility for compliance by non-lawyers with applicable provisions of the model rules).

[84] Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[85] Rule 5.3 Responsibilities Regarding Nonlawyer Assistance:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[86] *In re Geno, supra.*

lawyer's name to it.[87] After learning about the secretary's misconduct, the lawyer failed to bring it to the court's attention and further failed to file a brief with the BIA. Here the lawyer appears to have violated MR 5.3 as well.

A New York lawyer, discussed above at --, who practiced before the Circuit Court of Appeals for the Second Circuit discussed at -------, was sanctioned for filing deficient briefs and missing court deadlines. She admitted that she failed to adequately supervise a lawyer who had prepared briefs for her.[88]

In each of the above cases, the lawyers were held responsible for the misconduct committed by their supervisees.

D. Hypotheticals

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: When Diligent Preparation is not Enough

A lawyer has a very busy immigration practice. He has many clients and keeps a calendar to remind him of deadlines. A new client had filed an I-130 on her own for her husband, a foreign national from Botswana. She received a detailed Notice of Intent to Deny (NOID), and hires the lawyer to assist with the response. The NOID pointed out discrepancies at the interview of the husband and wife. The wife assures the lawyer that she can explain the discrepancies and does so to his satisfaction. The lawyer takes the case, drafts a response to the NOID and receives supporting documents from the client, but files a late response to the NOID. The case is denied on the basis that the response was not timely filed. The lawyer realizes that he missed the filing date and notifies the client. He then files a Motion to Reopen with the response to the NOID.

This scenario addresses both aspects of Rule 1.3: diligence and promptness. Here it appears that the task of timely mailing the NOID response basically fell through the cracks.

Analysis

Does the lawyer's failure to file a timely response to the NOID amount to a lack of diligence?

Yes, in the sense that taking steps to insure timely filing is also part of diligent practice. Here the lawyer was diligent in preparing the NOID response in accordance with the client's information and wishes. All that was required was to mail the papers timely, but the lawyer failed to do that.

Does the lawyer's failure to file a timely response to the NOID, after completing it, amount to a lack of promptness?

Yes, but an important issue is the reason for the late filing. Here we are told the lawyer kept a calendar, which is good, but we do not know if he routinely checked it in advance of the due date. Presumably here he did not.

While there is no per se rule as to the type of calendaring system an immigration lawyer should use, if an immigration lawyer has a heavy caseload, better practice would be to use a case management software

[87] *In re Montoya, supra.*

[88] *In re Yan Wang, supra.*

product. There are numerous software programs for immigration practitioners designed not only for calendaring, but also for maintaining a complete record of the client's case. Irrespective of what type of calendaring system a lawyer uses, some lawyers rely on office staff to check the calendar and mail papers that are ready. If so, the lawyer needs to take steps to regularly monitor the staff's work to make sure they are trustworthy and competent. Good office management would require weekly meetings with staff to go over the coming week's work, as well as double-checking on work that was to have been completed. If the lawyer does all her own work and has no office support, she would need to develop regular routines to manage her cases, which includes meeting deadlines. In the end, if the lawyer does not make it a regular practice to monitor filing dates, the particular calendaring system he chooses will not make a difference. Because the lawyer failed to file the NOID response timely, he violated MR 1.3.

Since the lawyer's failure to file the NOID response timely violates MR 1.3, would such misconduct warrant discipline?

Probably not, if this was the lawyer's first disciplinary violation.

MR 1.3 provides that a lawyer "shall" provide diligent and prompt representation and thus on its face it is a strict liability rule. However, disciplinary authorities generally take into consideration that any lawyer can make a mistake which need not automatically trigger the imposition of discipline. In addition, here there are some mitigating factors: the lawyer accepted responsibility for the untimely filing, told the client about it and took steps to re-open the case. Even though there is no guarantee that the immigration authorities would grant the motion, at least the lawyer took steps to protect the client.

As to alternates to discipline, in many jurisdictions where disciplinary authorities issue so-called educational letters or dismissals with warnings, the lawyer here would be more likely get one with the recommendation that he take steps to avoid future late filings. If the lawyer has a history of late filings or other professional misconduct, the lawyer would more likely be subject to formal discipline.

Would the lawyer's failure to file the response to the NOID timely amount to malpractice?

Probably not, even though the first two elements of a malpractice action have been met. There was a lawyer-client relationship and missing a filing deadline would amount to a deviation of the standard of care for the reasonable lawyer – immigration or otherwise.

However, here the client would probably have difficulty establishing the third element: but for causation. If the motion to reopen were denied, the client would have to prove that but for the lawyer's failure to timely file the response to the NOID, she would have been successful on the merits. The burden of proof would be high given that there was already an intent to deny based upon the documentary evidence and the couple's responses at the interview. If the motion to reopen were granted, there would be no injury because the lawyer has cured his mistake by filing the motion to reopen and any adverse result on the merits was not related in any way to the lawyer's untimely NOID response.

Hypothetical Two: When Procrastination Becomes a Problem

A lawyer regularly waits until the last minute to file documents, forms, or to complete tasks. Often she is in such a great hurry to file that her work product is sloppy. There is no question that she is competent to handle matters in an efficient and timely matter but she does not. On occasion this leads to filing without all required supporting documents or to the rejection and re-filing of an application because the initial submission is sent to the wrong Service Center or without enclosing the proper filing fees. She is usually able to correct any misdeeds upon re-filing properly and with the right Service Center. She regularly receives Requests for Evidence (RFE) to fill in the missing information or documents she should have sent with the original filings. To date she has not missed any jurisdictional filing dates.

This scenario also addresses both aspects of diligence and promptness, but in cases where the poor quality of the work produced and misfilings put the client at risk. It also causes unnecessary delays in processing the relief sought. The scenario presents the question of whether a lawyer's lack of diligence and promptness can amount to a violation of MR 1.3, if the client obtains the relief sought.

Analysis

Does the lawyer's practice of not attending to legal tasks until just before the filing deadline amount to a lack of diligence and promptness in violation of MR 1.3?

Most likely yes. In immigration cases and others, MR 1.3 would require that a lawyer's work product represent the lawyer's best efforts to achieve the desired result and that the processing time not be delayed because of a sub-standard work-product or misfiling, even if it can be corrected. Diligence requires that the lawyer do her utmost to insure that she produces a complete and professional work-product by taking the time necessary to do so. The amount of time needed may depend upon the lawyer's competence, resources and her work-load. However, a prudent and conscientious lawyer should know how much time she needs. Except in cases where a lawyer is faced with an unexpected deadline, a lawyer who habitually waits to the last minute to file papers increases the likelihood that her work will be sloppy and incomplete. Moreover, even if the lawyer is permitted to correct errors or produce evidence out of time, the processing of the matter will be delayed. Since in immigration matters, in particular, there are agency delays and often long processing times, any unnecessary delay caused by the lawyer can harm to the client, A client may also suffer emotional harm caused by the stress and aggravation associated with filing so close to the deadline.

Here the lawyer's mode of practice is more likely to result in shoddy or incomplete work. That the lawyer is "usually" able to cure deficiencies in her filings does not excuse her practice of waiting to the last minute. The lawyer's cavalier approach to handling her cases violates the spirit of MR 1.3 and in many cases the letter as well.[89]

Does the lawyer's practice of waiting to attend to legal tasks until just before a filing deadline warrant discipline?

Maybe. If the disciplinary investigation reveals the lawyer's pattern of practice, the lawyer could be disciplined on the basis that the way she practices increases the likelihood that she will miss a filing date, or submit sloppy or incomplete papers which may adversely affect her clients. Even if there is no discernable injury, the lawyer would not be providing diligent representation. It is hard to imagine that

[89] It might also amount to a violation of MR 3.2 (failure to expedite litigation) depending on the circumstances.

the lawyer here would not at least receive a warning and there also would be justification for a lower level of discipline as well. Of course, if the lawyer were not able to cure the deficiencies in her submissions and a client's matter was actually denied as a result (or even unnecessarily delayed), it is more likely that the disciplinary authority would impose discipline. If, as a result of the disciplinary investigation, the lawyer accepted responsibility for her misconduct and made the necessary changes to the way she practices, the lawyer might be able to avoid formal discipline.

Would the lawyer's mode of practice amount to malpractice?

No, unless one of the lawyer's clients was actually denied the relief sought as a result of the lawyer's sloppy or otherwise incomplete work-product. As in all cases of malpractice, the client would have to satisfy the "but for" causation requirement. Under the facts set forth in the scenario, no client appears to have suffered a discernable injury, except possible delay, as a result of the lawyer's manner of practicing. If the delay in filing caused prejudice to the client - such as through a missed deadline for an extension of status that required departure from the country and resulted in the loss of employment - the result may be different.

Hypothetical Three: It Takes Time Anyway, What Difference Does It Make If It Takes a Little Longer?

A lawyer regularly does visa petitions that require consular processing for clients with the National Visa Center (NVC). He knows that dealing with the NVC is often problematic and that the whole process can be stretched out over a period of years. He works on cases when he feels like it and does not feel that he needs to meet any real deadlines. As a result, cases that generally should take four (4) to six (6) months routinely take him fourteen (14) to twenty-two (22) months. Attorney C tells clients that "these things just take time." His cases are always completed and the beneficiary receives their visa albeit in ten (10) to sixteen (16) months longer than others similarly situated.

This scenario is a example of a complete lack of diligence (and accompanying lack of promptness) by a lawyer in which the injury is solely delay in obtaining the desired relief. In the immigration context, delay without more still may have serious consequences.

Analysis:

Does the lawyer's manner of pursuing client matters—with no timetable or concern about the impact of added delay to the client in obtaining a visa—amount to a lack of diligence and promptness?

Most certainly, yes. While it is true that there may be no filing deadlines in the lawyer's cases and that the clients ultimately obtain their visas, the clients do not get them as quickly as they could if the lawyer works on the matters promptly after he was retained. A lawyer who works on cases only when he feels like it, by definition, is not providing diligence and prompt representation. It is easy to conclude that the lawyer is violating MR 1.3.

The fact that the lawyer advises his clients that "these things take time" does not excuse or even mitigate his wrongdoing. Indeed, his statement raises the question of whether he is being purposely vague. It could be argued that he is trying to give the impression that the process itself is extremely slow rather than disclosing that he is not going to work on the matters with diligence and promptness. Assuming this is all he tells his clients, the statement would appear to be misleading.[90] This is not a

[90] *See* MR 8.4(c) and 1.4.

situation where a lawyer tells a client that he is too busy to start work on the matter and that is why it will take more time than it should. In such a case, the client would have the option of finding a lawyer who can promptly handle the matter.

In this scenario, the lawyer's delay in filing papers or taking any other necessary action timely violates MR 1.3, because he is neither prompt nor diligent.

Does the lawyer's failure to handle the visa filings diligently and promptly in violation of MR 1.3 warrant discipline?

More likely yes, given the extent of the delay, *i.e.*, about a year more than the process would usually take. Although the lawyer's clients do obtain the visas ultimately, they do not do so promptly. They suffer the harm of unnecessary and significant delay. In the immigration context, a client's desire to obtain a visa as quickly as possible is the norm. It is difficult to imagine an immigration client telling the lawyer that he does not care how long it takes to get a visa. On the contrary, for these clients, there is a lot at stake. They often put their lives on hold while waiting for a visa. An additional year or more of unnecessary waiting time can result in serious consequences to the client who is waiting to join his spouse or start a good job.

If a disciplinary authority were able to discern the lawyer's modus operandi, it would most likely impose discipline. As a general matter, the severity of the discipline would depend on aggravating factors such as prior discipline and failure to accept responsibility and mitigating factors, among them, evidence that the lawyer has changed his way of practicing and the promise not to engage in unnecessary delay in the future.

Does the lawyer's violation MR 1.3 constitute malpractice?

Under this scenario, there is mostly likely no malpractice, unless the jurisdiction in which the suit was brought deemed "unnecessary delay" as a compensable injury. The result may be different if the delay was substantial enough that it caused the applicant to lose his job or led to the termination of his marriage because of the long separation.

Hypothetical Four: When To Consider Pre-Vacation Planning

A solo immigration lawyer representing a client in applying for asylum was ordered by the Immigration Judge to file all primary supporting documents at least 15 days before the hearing in compliance with the Immigration Court Practice Manual deadline. Although the client provided the lawyer with supporting documents and affidavits from family members two months earlier, the lawyer temporarily closed his office because he was traveling overseas. He failed to file the supporting documents until three days before the removal hearing. The Judge excluded the evidence for being untimely, and later denied the asylum application, finding that the client's testimony was not credible.

This is another example of an untimely filing, but here we know the cause: the lawyer simply abandoned his responsibility to his client when he temporarily closed his office for personal reasons.

Analysis

Does the lawyer's failure to comply with the court's order to file supporting documents no later than fifteen days before his client's hearing amount to lack of diligence and promptness in violation of MR 1.3?

Yes. Submitting documents timely and pursuant to court order is a fairly straightforward task, especially where the client has provided the documents well in advance of the due date. Here, when the lawyer decided to take a temporary break from his law practice, he had several options to make sure the documents were filed timely. He could have filed the documents before closing his office. He could have made arrangements with another lawyer to cover the case, assemble the papers for filing and to file them timely. He might have even used an outside paralegal service to file the papers timely. Upon realizing that the documents had not been timely filed, rather than just submitting them late, he could have requested leave from the court to file the documents late, taking responsibility for the delay, so that his client would not be penalized. Even if the court denied the request, the issue would then have been preserved as a basis for appeal either by the lawyer himself or a subsequent lawyer based on the lawyer's ineffective assistance of counsel.

Does the lawyer's failure to comply with the court's order to file the supporting documents before a date certain amount to a violation of MR 1.3 warranting discipline?

Most likely yes because, as discussed, the lawyer had several options to insure that the documents would be submitted timely notwithstanding that he temporarily closed his office. This is not a case where a task slipped through the cracks. It was not a "mistake." The lawyer abrogated his responsibilities to the client and such conduct would warrant discipline of some kind. The lawyer would more likely be subject to serious discipline if the documents that were to be submitted corroborated the client's testimony and therefore provided a basis for the judge to grant asylum.

Would the lawyer's misconduct here amount to malpractice?

Mostly likely yes, if the client were ordered deported.

Here the first two elements of malpractice would be easily satisfied. There was a lawyer-client relationship and the lawyer's temporary abandonment of his practice was negligence. But the client would still have to prove that but for the lawyer's negligence in filing the supporting papers out of time, the court would have found the client credible and granted asylum. This would require expert testimony in the first instance that the excluded documents supported the client's testimony as to the basis for his asylum claim. The expert would also have to opine that the court would have found that the client was credible and granted asylum. In other words, the expert would have to opine that the immigration judge would have had no reasonable basis to question the client's credibility.

Of course, if the client actually was successful in reopening his case and granted asylum, there would be no injury and thus no basis for the imposition of damages.

Hypothetical Five: Losing the Farm

While still working in H-2A status, a foreign national decided to rent land from his agricultural employer, upgrade the infrastructure, and move his dairy cows from Canada to start his own dairy farm in the U.S. He retained a lawyer shortly after his H-2A status had expired to prepare and file an E-2 investor visa application with the U.S. Consulate. The E-2 investor visa would have permitted the client to return to the U.S. to operate the new business in which he invested

his lifesavings. Despite repeated phone calls for updates, the lawyer took several months longer than expected to complete the paperwork, always insisting on more documentation. By the time the lawyer had prepared the client's E-2 application and scheduled his visa appointment, the client had already stayed in the U.S. more than six months after his H-2A status had expired. Because of this, the client's E-2 visa application was denied; he was subject to the three-year bar under INA §212(a)(9)(B(i)(I).[91] The client had to wait outside the U.S. for three years before being able to apply for the E-2 investor visa.

This is a variation on the theme of late filing as a result of the lawyer's lack of diligence in keeping track of the time his client remained in the U.S. after losing his H-2A status.

Analysis

Did the lawyer's failure to keep track of the time in which the client was present in the U.S. after the end of his H-2A status amount to lack of diligence in violation of MR 1.3?

Yes, because the fact that the client was out of status and still in the U.S. created a critical issue that the lawyer needed to keep in mind from the get-go. The prudent and conscientious lawyer would have advised the client to leave the country as soon as possible after the expiration of his H-2A status, and certainly before the 180-day deadline. The client would have had to leave the country anyway as a prerequisite to obtaining the visa once he was out of status. Having failed to so advise the client, the lawyer was then obliged to keep track of the 180-day deadline in order to avoid the three-year bar to obtaining the new visa. Given that the client called the lawyer from time to time for an update, it is hard to imagine how the lawyer could have lost track of the time he was taking to prepare the papers. The lawyer failed to provide diligent representation as required under MR 1.3 because he did not protect his client from being subject to the 3-year bar.

Did the lawyer's failure to exercise diligence in violation of MR 1.3 warrant discipline?

It would seem so. Since there is nothing in the scenario to suggest that the lawyer was incompetent, we must assume he knew the relevant law. Even giving him the benefit of the doubt that he may have miscalculated the date, rather than not checking at all, when a client calls repeatedly to check on the status of a matter, the lawyer is at least on notice that the client is eager to complete the process. That should have been a red flag for the lawyer to check his timetable. Even without the client's repeated calls, the lawyer's failure to advise the client to leave the country or, in the alternative, to file for the E-2 visa well before the 180-day deadline, warrants discipline. Even if the lawyer had a justifiable reason for taking more time to prepare and file the appropriate papers, there can be no justification for not protecting his client's best interests by advising the client to leave the country in time to avoid the three-year bar.

Does the lawyer's failure to exercise diligence in violation of MR 1.3 amount to malpractice?

Hard to tell. Surely, the three-year bar amounts to an injury to the client, even if he eventually obtained the E-2 visa. The client, however, would have to prove that the injury was caused by the lawyer's failure to advise the client to leave the country before the six-month time period. In his defense, the lawyer might try to argue that there is no but for causation because the client knew or should have

[91] INA §212(a)(9)(B(i)(I) provides that a foreign national who was unlawfully present for a period of more than 180 days and less than one year, and then leaves the country prior to the commencement of removal proceedings, is inadmissible for three years. If the client left the United States after the commencement of removal proceedings pursuant to a grant of voluntary departure prior to the accrual of 1 year of unlawful presence, he would have been able to escape the 3-year bar.

known that he needed to leave the country by a date certain. In other words, the lawyer would argue that it was the client's responsibility to know he had to leave the country after his H-2A status expired, and before the six-month deadline. How these arguments would play out in malpractice litigation would depend on facts not presented in the scenario. Most experts would probably argue that diligent representation would require that the lawyer be responsible for advising the client about the deadline and following up with the client to make sure he left in time. In any event, assuming that the client was able to establish but for causation, there still might be an issue as to damages. Here the lawyer might argue that the client was not injured because he still would be able to get the E-2 visa at a later time, and he could hire someone to manage his business in the U.S. The client would respond that by having to wait three years, he lost income at the very least, or, more likely, that he lost his entire business and life-savings. He also lost his ability to live in the United States for at least three years, or longer because of the likely loss of his investment or the impact on any new application of his previous visa denial and adverse immigration history.

Hypothetical Number Six: Deciding Case Strategy: Pursuing Simultaneous Relief or Focusing on One Thing at a Time?

A lawyer is retained to represent a client after he is placed in removal proceedings based on his referred asylum application. The client's wife is a U.S. citizen, but the husband is ineligible to apply for adjustment of status because he entered without inspection. The lawyer advises the wife that she may consider filing an I-130 relative petition for her husband based on their marriage as an alternative to asylum, or as a back-up strategy if the asylum case is not granted, and the lawyer explains that the husband would need to leave the country for consular processing abroad based on the approved I-130 petition. The lawyer does not discuss the I-130 option further and does not file the I-130 petition. The client continues with his asylum application. During the next two years, the lawyer twice files to extend the husband's employment authorization, and continues meeting with the husband to prepare for his asylum hearing. After the husband's individual hearing, the Immigration Judge denies the asylum application but grants voluntary departure. The husband and wife ask the lawyer when the husband will be scheduled for his immigrant visa interview. The lawyer informs them that he never filed the I-130 petition. He explains about current I-130 processing times, and the additional time needed for the immigrant visa application to be processed through the National Visa Center following the I-130 approval. The husband and wife are furious, since they assumed that as the husband's lawyer, he had filed the I-130 petition much earlier based on his discussion two years ago regarding the I-130 petition as a back-up strategy. The husband now may need to leave the country and live apart from his wife for a much longer period than he would have if the lawyer had filed the I-130 petition two years ago when he first discussed the option.

This scenario explores the degree of diligence that may be required under MR 1.3. Here, it was in the client's best interests for the lawyer to pursue the marriage-based petition at the same time he was representing the client on the asylum case in removal proceedings. How far should the lawyer have gone to provide diligent representation under MR 1.3?

Analysis

Did the lawyer's failure to pursue the marriage-based petition at the same time as he was handling the asylum matter amount to a lack of diligence in violation of MR 1.3?

Probably. Here there are actually two areas in which the lawyer did not appear to have exercised diligence. First, under MR 1.3, diligence would encompass pursuing the best avenues of relief for his clients. That could include pursuing alternative forms of relief simultaneously, in order to shorten the processing time or otherwise reduce the degree of inconvenience or hardship associated with the alternate form of relief. Here, the lawyer advised the client about the alternate form of relief. The only downside to pursuing the alternate strategy was that if the client were successful in the asylum claim, it would turn out that there was no need for the marriage-based petition to be in place. The client presumably would have paid fees for services that ultimately were not necessary. However, because the marriage-based option would require the husband to leave the country for consular processing of the visa, the advantage of pursuing the marriage-petition simultaneously with the asylum matter would be that the time the husband needed to stay out of the country would be reduced.

The lawyer was somewhat diligent in at least advising the clients about the option, but he appears to have backed away from overtly providing a recommendation to the clients or simply confirming with them as to whether that they wanted him to pursue the I-130 petition. A prudent and conscientious lawyer would have understood that by discussing an alternate form of relief with the clients during the course of the representation, he may have created a reasonable expectation that he would pursue it. Most clients depend on their lawyers to pursue their best interests. So here the lawyer missed the mark of diligence in two ways. He failed to understand that the discussion of an alternate form of relief without more might result, as it ultimately did, in the client's assumption that he would pursue the alternate form of relief. Diligence included resolving any ambiguity as to the courses of action the lawyer would pursue. Without explicit resolution as to the client's wishes, diligence would have required that the lawyer begin the marriage-based petition process, which as a practical matter, would have given the clients the opportunity to make an informed decision as to whether they wanted to pursue that strategy for financial reasons or otherwise. Here the lawyer did neither.

The lawyer had to address the marriage-based option once the he learned of the client's marriage to a U.S. citizen. This is not a question of whether the lawyer would have been less vulnerable had he not advised the client about this option in the first instance. Because the marriage-based petition was clearly a viable strategy to consider, the lawyer could not have provided diligent representation without offering the clients the option of pursuing the marriage-based petition as an alternative strategy to asylum, or as a course of action that could be pursued simultaneously.

Would the lawyer's failure to resolve the ambiguity concerning the marriage-based back-up plan amount to a violation of MR 1.3 warranting discipline?

Difficult to call. The circumstances here are unusual in that it is hard to imagine how an otherwise competent lawyer would be comfortable with opening a discussion about a viable alternate form of relief without obtaining his client's informed decision about whether to pursue it. If the lawyer were able to provide insight into his thought process, by way of excuse, as well as accepting responsibility, the lawyer might be able to avoid discipline. This of course presumes the lawyer has no prior discipline or there are no other aggravating factors.

Did the lawyer's failure to pursue the marriage-based petition at the same time as he was handling the asylum matter amount to malpractice?

It depends on several different factors. First, if the husband were successful in his asylum matter, there would be no injury and thus no basis for a malpractice action.

Assuming the husband was not granted asylum and the lawyer appealed, the injury would be the additional time the husband would have to spend out of the country and away from his wife while waiting for the marriage-based petition to be processed, and the length of time it would take for the appeal would mitigate the impact of the delay in filing the I-130 petition earlier if filed during the appeal period. Assuming that a case could be made for compensatory damages for lost wages or the emotional harm of being separated from his wife, the clients would first have to prove that but for the lawyer's failure to file the marriage-based petition earlier, the husband would not have had to spend as much time out of the country and away from his wife. An expert would have to opine that under the circumstances, the standard of care was that the lawyer was required to confirm the client's understanding that they gave their informed consent as to whether or not he should pursue the marriage-based petition. Then, they would have to establish that but for the lawyer's failure to file I-130 while the removal case was pending, the husband would not have had to suffer the injury—financial or emotional—of having to stay out of the country while waiting for his visa.

E. State Rule Variations

One of the foundations of the lawyer-client relationship is that a lawyer be diligent in his or her representation of the client. One of the first rules in the ABA Model Rules of Professional Conduct, Model Rule 1.3, provides, "A lawyer shall act with reasonable diligence and promptness in representing a client." Each state (and the District of Columbia) has a diligence requirement in its respective ethical rules. Of the fifty states and the District of Columbia, forty-six jurisdictions apply the current version of Model Rule 1.3[92] (four of which add further substance to Model Rule 1.3) and five jurisdictions have a different requirement for diligence.[93]

Jurisdictions that Add Substance to Model Rule 1.3

There are four jurisdictions whose respective rules on diligence contain the text of Model Rule 1.3, but also add language that is not provided in the Model Rule itself. These four jurisdictions are Georgia, Massachusetts, New York, and Virginia. Language additions and variations for each of the four jurisdictions are articulated below.

Georgia

Georgia adds an intent component to diligence by prohibiting a lawyer from "willfully" abandoning or disregarding a legal matter entrusted to the lawyer.[94] Georgia further provides that disbarment is the maximum penalty for a violation of the diligence rule.[95]

[92] The following states have adopted the language of Model Rule 1.3 but use a different numbering system: Florida (4-1.3), Iowa (Rule 32:1.3), Kansas (Rule 226:1.3), Kentucky (Rule 3.130:1.3), Missouri (Rule 4-1.3), Nebraska (Rule 3-501.3), New Mexico (16-103), South Carolina (Rule 407:1.3), and Wisconsin (Rule 20:1.3).

[93] In other words, 42 jurisdictions apply a diligence rule that is identical to Model Rule 1.3. Four jurisdictions include all of the language in Model Rule 1.3 but add additional substance to their respective diligence rules. The diligence rules in five jurisdictions vary significantly from Model Rule 1.3.

[94] "Reasonable diligence as used in this Rule means that a lawyer shall not without just cause to the detriment of the client in effect willfully abandon or willfully disregard a legal matter entrusted to the lawyer." GA Rule 1.3.

Massachusetts

The Massachusetts rule regarding diligence adds a zealousness provision, providing that a lawyer should represent a client zealously.[96] This is similar to Comment 6 to the Texas diligence and competence rule and in contrast to Comment 1 to Model Rule 1.3, which provides that a lawyer must zealously advocate for his or her client.[97] This is also in contrast to the District of Columbia rule, discussed below, which provides that a lawyer shall represent a client zealously.

New York

In addition to the language mirroring Model Rule 1.3, New York's diligence rule adds language, which prohibits a lawyer from neglecting a legal matter.[98] New York's rule also adds language prohibiting a lawyer from intentionally failing to carry out a contract with a client for professional services, though the lawyer may withdraw if permitted by the ethical rules.[99] This is similar to Comment 4 to Model Rule 1.3, which requires a lawyer to carry to conclusion all matters undertaken for the client unless the relationship is terminated.[100]

Virginia

Like New York, Virginia adds language that is very similar to the beginning of Comment 4 to Model Rule 1.3, in that it prohibits a lawyer from intentionally failing to carry out a contract of employment entered into with a client.[101] A lawyer may, however, withdraw as permitted under Rule 1.16 (declining or terminating representation).[102] Virginia's rule also prohibits an attorney from intentionally prejudicing or damaging his or her client, except as required or permitted under Rule 1.6 (confidentiality) and Rule 3.3 (candor toward the tribunal).[103]

Jurisdictions with Different Diligence Rules

In addition to the states that supplement the language of Model Rule 1.3, there are five jurisdictions that revamp the Model Rule in substantial ways. Of these five, only the District of Columbia still retains most of the language in the Model Rule. The diligence rules in Alabama, California, Oregon, and Texas, respectively, are sharply distinct from Model Rule 1.3. These distinctions and additions are described below.

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[95] The following Georgia rules dealing with the client lawyer relationship also provide for disbarment as the maximum penalty: Rule 1.1 (competence), Rule 1.2 (scope of representation), Rule 1.6 (confidentiality), Rule 1.7 (conflict of interest), Rule 1.8(b) (use of client information), Rule 1.9 (conflict of interest: former client), Rule 1.10 (imputed disqualification: general rule), Rule 1.11 (successive government and private employment), Rule 1.15(I) (safekeeping of property: general), Rule 1.15(II)(a) and 1.15(II)(b) (trust account and IOLTA), and Rule 1.15(III) (record keeping). There are other Georgia rules for which the maximum penalty is less than disbarment.

[96] "The lawyer should represent the client zealously within the bounds of the law." MA Rule 1.3.

[97] "A lawyer must also act . . . with zeal in advocacy upon the client's behalf." Model Rule 1.3, cmt. 1.

[98] "A lawyer shall not neglect a legal matter entrusted to the lawyer." NY Rule 1.3(b).

[99] "A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules." NY Rule 1.3(c).

[100] "Unless the relationship is terminated as provided in Rule 1.16 [Declining or Terminating Representation], a lawyer should carry through to conclusion all matters undertaken for a client." Model Rule 1.3, cmt. 4.

[101] "A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16." VA Rule 1.3(b).

[102] *Id.*

[103] "A lawyer shall not intentionally prejudice or damage a client during the course of the professional relationship, except as required or permitted under Rule 1.6 and Rule 3.3." VA Rule 1.3(c).

Alabama

Alabama has a different diligence rule than Model Rule 1.3. The text of the rule uses the term neglect instead of diligence, prohibiting a lawyer from willfully neglecting a matter that is entrusted to him or her.[104] By adding the word "willful," the Alabama diligence rule adds a mental state component not present in Model Rule 1.3.

California

California Rule 3-110, titled Failing to Act Competently, is entirely different from Model Rule 1.3. The California rule blends the concepts of competence and diligence into the same rule. California prohibits a lawyer from failing to perform legal services with competence, and defines competence as applying the diligence, among other things, "reasonably necessary" to perform legal services.[105] Thus, California refers to diligence as a component of competence.

Washington, DC

The District of Columbia's version of Rule 1.3 is titled "Diligence and Zeal," rather than just "Diligence." The District of Columbia requires that a lawyer represent a client diligently and zealously.[106] This is similar to Comment 1 to Model Rule 1.3[107] and, as previously noted, in contrast to Massachusetts' rule and Comment 6 to the Texas rule, which provide that a lawyer should represent a client zealously. In addition, and unlike the Model Rule, the District of Columbia prohibits a lawyer from intentionally failing to seek the objectives of a client through reasonably available means permitted by law and ethical rules.[108] This is also similar to Comment 1 to Model Rule 1.3.[109] The District of Columbia's rule further prohibits a lawyer from intentionally prejudicing or damaging a client.[110] Finally, the District of Columbia rule includes language that closely mirrors Model Rule 1.3, but removes the word "diligence" and instead only requires that the lawyer act promptly in a representation.[111]

Oregon

Oregon's formulation of the diligence rule varies from Model Rule 1.3 by referring to neglect. Like New York's rule, Oregon's diligence rule prohibits a lawyer from neglecting a legal matter.[112] There is no reference to zealousness or diligence, and the Oregon Rules of Professional Conduct do not include comments in the published version.

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[104] "A lawyer shall not willfully neglect a legal matter entrusted to him." AL Rule 1.3.

[105] "A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence. . . . For purposes of this rule, 'competence' in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service." CA Rule 3-110 (A) & (B).

[106] "A lawyer shall represent a client zealously and diligently within the bounds of the law." DC Rule 1.3(a).

[107] "A lawyer must also act . . . with zeal in advocacy upon the client's behalf." Model Rule 1.3, cmt. 1.

[108] "A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of a client through reasonably available means permitted by law and the disciplinary rules . . . ." DC Rule 1.3(b)(1).

[109] "A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Model Rule 1.3, cmt. 1.

[110] "A lawyer shall not intentionally . . . [p]rejudice or damage a client during the course of the professional relationship." DC Rule 1.3(b)(2).

[111] "A lawyer shall act with reasonable promptness in representing a client." DC Rule 1.3(c).

[112] "A lawyer shall not neglect a legal matter entrusted to the lawyer." OR Rule 1.3.

Texas

Like California, Texas does not have separate rules for competence and diligence. With respect to diligence, Texas Rule 1.01, titled Competent and Diligent Representation, prohibits a lawyer from neglecting a legal matter or frequently failing to competently carry out the obligations owed to a client.[113] This is similar to Comment 4 to Model Rule 1.3[114] and New York Rule 1.3(c) because of the extent of obligations owed to a client. Texas includes a mental state requirement for "neglect," requiring inattentiveness with a "conscious disregard" for responsibilities owed to the client.[115] Comment 6 to Texas Rule 1.01 provides that a lawyer should act with zeal in advocating upon the client's behalf, and provides that a lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness.[116] This is similar to Massachusetts' rule and unlike Comment 1 to Model Rule 1.3, which provides that a lawyer must act with zeal in advocating on a client's behalf.[117]

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Meghan Moore

David Bloomfield

Reid Trautz

Maheen Taqui

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[113] "In representing a client, a lawyer shall not: (1) neglect a legal matter entrusted to the lawyer; or (2) frequently fail to carry out completely the obligations that the lawyer owes to a client or clients." TX Rule 1.01(b).

[114] "Unless the relationship is terminated as provided in Rule 1.16 [Declining or Terminating Representation], a lawyer should carry through to conclusion all matters undertaken for a client." Model Rule 1.3, cmt. 4.

[115] "As used in this Rule neglect signifies inattentiveness involving a conscious disregard for the responsibilities owed to a client or clients." TX Rule 1.01(c).

[116] "Having accepted employment, a lawyer should act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf. A lawyer should feel a moral or professional obligation to pursue a matter on behalf of a client with reasonable diligence and promptness despite opposition, obstruction or personal inconvenience to the lawyer." TX Rule 1.01, cmt. 6.

[117] "A lawyer must also act . . . with zeal in advocacy upon the client's behalf." Model Rule 1.3, cmt. 1.

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Communications

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MODEL RULE 1.4 COMMUNICATIONS

Introduction and Background

The exchange of information between a lawyer and a client is essential to carrying out core representational responsibilities. Without effective communication, the lawyer cannot properly inform her client of the client's legal rights and obligations; she cannot gather sufficient information to be an effective advocate; and she cannot engage in informed negotiations and communications with other parties and lawyers.[1] Model Rule 1.4 explicitly recognizes the importance of effective communication between the lawyer and client,[2] and delineates the broad categories where communication is mandatory:

- To inform the client of any circumstance where the client's informed consent is required;[3]
- To provide reasonable updates on the status of the legal matter;[4]
- To consult with the client on the means by which the client's objectives are being pursued;[5] and,
- To provide sufficient explanations to the client so she can make informed decisions regarding the representation.[6]

Immigration lawyers face a number of distinct challenges in meeting these mandates. First, as a practical matter, immigration lawyers are much more likely to interact with clients for whom English is not their first language. Where the lawyer cannot communicate fluently with a client herself, the use of interpreters is necessary, but also fraught with potential risks when the accuracy of the translation is in question. When an interpreter is required, how can concerns about competent translation be addressed?

In addition, many types of immigration matters have extremely long processing times. Individual hearings in asylum cases are frequently scheduled three or more years out; the waitlist for certain family-based immigration applications is well over 10 years; and even citizenship applications require several months waiting time. How often are updates to a client required to meet a "reasonableness" standard in cases that take so long to be resolved?

Finally, given the power of the executive branch to dictate large portions of immigration policy, the state of relevant immigration policies and practices can be in flux. Under what circumstances should the lawyer communicate these changes to her client?

The annotations and commentary portion of the chapter addresses these and other questions, including:

- With respect to the means to achieving the client's goal, when must the client be consulted? When does the client's decision on the way the case is handled control?
- How should a lawyer "communicate" with a "missing client"?
- How "prompt" and "frequent" must communications with a client be?
- How broad is the scope of the duty to "explain the matter" to the client?
- When, if ever, may a lawyer withhold information from a client?

The answers to these questions are of great significance not only because effective communication is essential to every aspect of competent lawyering, but also because a lack of sufficient communication is commonly cited as one

[1] *See* MR Preamble ¶2.
[2] MR 1.4, Cmt. 1 ("Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.").
[3] MR 1.4(a)(1).
[4] MR 1.4(a)(3) and (4).
[5] MR 1.4(a)(2).
[6] MR 1.4(b).

of the most common bases for client grievances about their lawyers.[7] Developing policies and implementing procedures for prompt communication with clients is one of the best ways to avoid ethics complaints, and to ensure clients feel as though their lawyers are taking their cases seriously.

Model Rules 1.2 and 2.1 also closely relate to a lawyer's duty to communicate effectively with her client, especially with respect to the content of advice that must be communicated to a client. The scope of that ethically mandated advice is notably broad, and includes communicating about the legal consequences of proposed courses of action,[8] as well as providing the level of independent and candid advice necessary to ensure the client makes informed decisions.[9]

The rest of this chapter will give the text of Rule 1.4 and relevant portions of related rules; provide annotations and commentary that address the questions enumerated above, as well as other questions; analyze a series of hypotheticals based on realistic scenarios that immigration lawyers may encounter; and describe key state rule variations from the Model Rule.

A. Text of Rule

ABA Model Rule 1.4 – Communications

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment – Model Rule 1.4

[1] Reasonable communication between the lawyer and the client is necessary for the client to effectively participate in the representation.

Communicating with Client

[2] If these Rules require that a particular decision about the representation be made by the client, paragraph (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[7] https://abovethelaw.com/2018/06/common-complaints-about-lawyers-from-online-review-sites/.
[8] MR 1.2(d).
[9] MR 1.4(b); MR 2.1.

[3] Paragraph (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations — depending on both the importance of the action under consideration and the feasibility of consulting with the client — this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

[4] A lawyer's regular communication with clients will minimize the occasions when a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, paragraph (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation, a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e).

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

Selections from Other Relevant Rules

ABA Model Rule 1.2 - Scope of Representation and Allocation of Authority between Client and Lawyer
(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.…
(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client…

ABA Model Rule 2.1 - Advisor
In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

8 C.F.R. §1003.102
…
A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:
…
(p) Fails to abide by a client's decisions concerning the objectives of representation and fails to consult with the client as to the means by which they are to be pursued, in accordance with paragraph (r) of this **section**. A practitioner may take such action on behalf of the client as is impliedly authorized to carry out the representation
…[or]
(r) Fails to maintain communication with the client throughout the duration of the client-practitioner relationship. It is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands. A practitioner is only under the obligation to attempt to communicate with his or her client using addresses or phone numbers known to the practitioner. In order to properly maintain communication, the practitioner should:

> (1) Promptly inform and consult with the client concerning any decision or circumstance with respect to which the client's informed consent is reasonably required;
> (2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished. Reasonable consultation with the client includes the duty to meet with the client sufficiently in advance of a hearing or other matter to ensure adequate preparation of the client's case and compliance with applicable deadlines;
> (3) Keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation; and
> (4) Promptly comply with reasonable requests for information, except that when a prompt response is not feasible, the practitioner, or a member of the practitioner's staff, should acknowledge receipt of the request and advise the client when a response may be expected…

Key Terms and Phrases

"Reasonable"

The word "reasonable," and terms using the word "reasonably," are defined in Rules 1.0(h), 1.0(i) and 1.0(j). Generally speaking, the reasonableness of a lawyer's behavior is measured by the expected conduct of a "reasonably prudent and competent" lawyer. Although frustrating, this tautological definition is perhaps understandable, given the nearly infinite variety of circumstances that can affect what constitutes the prudent and competent course of action. For purposes of Rule 1.4, the questions of what constitutes a "reasonable" request for information by a client, and what constitutes keeping a client "reasonably" informed and advised about a matter, are analyzed in the Annotations and Commentary section of this chapter.

"Knows"

Under Rule 1.4(a)(5), a lawyer must inform the client about limitations on the lawyer's conduct where the lawyer ***knows*** the client expects unethical or illegal conduct by the lawyer. Under MR 1.0(f), the terms "knowledge" and "knows" are defined as "actual knowledge of the fact in question" which may be "inferred from circumstances." As a matter of best practice, of course, a lawyer should clarify quickly with a client anytime the lawyer even suspects the client is expecting unethical or illegal conduct.

"Informed Consent"

Under Rule 1.4(a)(1), a lawyer must inform her client of any issue where the client's informed consent is required. As defined in MR 1.0(e), informed consent denotes "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explained about the material risks of and reasonably available alternatives to the proposed course of conduct."[10]

B. Annotations and Commentary

Rule 1.4, the comments to the Rule, and relevant case law and ethics opinions, broadly cover two main categories of guidance regarding communication: the ***manner*** of communication, including frequency and mode of communication, in which the lawyer must communicate with a client; and the ***substance*** of what a lawyer must communicate to the client. These annotations and commentary are broken down into those two broad categories.

Manner of Communication

Frequency and Promptness of Communication

Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of the case, and to comply promptly with clients' reasonable requests for information about the case. The following example shows the interplay of these obligations, and how what constitutes "promptness" and "reasonably informed" depends a great deal on the case status and client expectations.

> *Example: Lawyer represents Client 1 and Client 2 in separate matters. In both cases, the clients applied for adjustment of status based on approved I-130 family-based petitions. The backlog in adjustment of status applications indicates that each client's application will not be processed for at least five years. Lawyer explains the likely waiting time to each client. Lawyer also reviews with both clients the importance*

[10] The definition of "informed consent" can vary across different jurisdictions. See the "State Variations" section of this chapter.

of keeping Lawyer's office apprised of any changes in contact information. After nine months have passed, Client 1 leaves a message with Lawyer's secretary, asking for an update on the status of the case. Client 2 does not seek an update. What are Lawyer's obligations to each client? Are they different?

A lawyer is obligated to keep a client reasonably informed about the status of a case.[11] Here, given that Lawyer has explained to both clients that the waiting time for processing is at least five years, there is no development that requires an update. However, Lawyer is nevertheless still obligated to respond promptly to reasonable requests for information from her clients.[12] Even though Lawyer has previously told Client 1 that it would be several years before any likely development and even though there is in fact no development to report, a request for information after nine months is not unreasonable. While the Rule itself does not specify a frequency of requests by a client that becomes "unreasonable," court rulings on the issue typically find that failing to respond at all to a request from a client, even where there is no new information, constitutes an ethical violation.[13] Excessive requests for updates from a client, for example, would not require an immediate response, though some response is necessary; in that circumstance, lawyers should also be mindful of maintaining an effective lawyer-client relationship in determining how promptly to return such calls.

There are circumstances where it may be ethically permissible to point clients to the law firm's case management system to check for updates on their case rather than call. For example, the status of a case may mean that updates consist solely of waiting for a visa priority date to become current. If this is properly explained to clients and the procedure for checking for updates is also explained, then clients can log into their "portal" for updates. In addition, both the Rule itself and the C.F.R. explicitly allow a member of the lawyer's staff to respond to the request, so long as the non-lawyer is not providing any legal advice other than an essentially verbatim transmission of the lawyer's advice.[14] In the scenario above, then, the fact that there is no news about the case does not obviate Lawyer's responsibility to respond to Client 1, and she should, at a minimum, have someone at her office acknowledge the call and remind Client 1 of when there will likely be news about the application.

Significance of Information Being Communicated

As would be expected, the more significant and urgent the information being communicated, the more "prompt" the communication should be.[15] For example, on the facts above, a Notice of Intent to Deny (NOID) with a 30-day deadline for response would require communication with sufficient time to address the grounds for the NOID.

Sometimes a development in the law, rather than in the case itself, can change the urgency of the need for communication with the client, and therefore what is sufficiently "prompt" communication.

[11] MR 1.4(a)(3).
[12] MR 1.4(a)(4).
[13] *Ky. Bar Ass'n v. Hines*, 399 S.W.3d 750 (Ky. 2013) (violation where lawyer failed to respond to letters from representatives of corporate client); *In re Waltzer*, 883 So. 2d 973 (La. 2004) (violation where lawyer ignored phone calls from clients); *Fla. Bar v. Flowers*, 672 So. 2d 526 (Fla. 1996) (violation where lawyer failed to respond to client's questions about legal documents); *In re Wenger*, 112 P.3d 199 (Kan. 2005) (violation where lawyer repeatedly failed to return phone calls from clients). Cf. *In re Schoeneman*, 777 A.2d 259 (D.C. 2001) (lawyer's failure to return client's phone calls for three weeks did not violate Rule 1.4 because client and lawyer spoke monthly about case).
[14] Both the Model Rule and the C.F.R. note that where a prompt response with information is not feasible, it is permissible to have a member of the lawyer's staff acknowledge the request and tell the client when a response from the lawyer can be expected. MR 1.4, Cmt. 4; 8 C.F.R. §1003.102(r)(4).
[15] *People v. Primavera*, 942 P.2d 496 (Colo. 1997) (violation where six months passed before lawyer informed client that he had been appointed to represent him; lawyer had also waited three days to inform client that judge ordered client's children be placed in the home of client's ex-wife's boyfriend, who had allegedly sexually abused the children); *In re Anschell*, 9 P.3d 193 (Wash. 2000) (violation where immigration lawyer, *inter alia*, failed to inform client, prior to deadline for filing motion to reopen, that application for status had been denied).

Example: Lawyer represents Client, an immigrant from Honduras, in a gang-based asylum claim in Immigration Court. Because of recent guidance from the Attorney General, it appears as though additional proof will be required to support the claim. Lawyer is aware that some proof, such as affidavits from Client's extended family members who are still in Honduras, will become increasingly difficult to get as time passes.

In this example, the legal development could have a significant effect on Client's case by making it substantially more difficult to win the asylum claim without additional proof. Because Lawyer is aware that certain affidavits will become more difficult to obtain, she must immediately communicate the development with Client and advise and assist Client on contacting the family members whose additional affidavits may be essential to winning the case.

Mode of Communication: Texts and Emails

There may be times when immediate communication, even of important matters, is not possible. Immigration lawyers, for example, may represent detained individuals for whom swift communication is more challenging and those with busy court practices may frequently be out of office. There is some flexibility for lawyers where direct and prompt lawyer-to-client communication is difficult to accomplish.[16] However, there are limits to the use of alternate modes of communication.

As a general principle, a lawyer is not necessarily required to engage primarily in face-to-face or telephonic communications with a client. Communications via email, texts, video, or other internet-based methods are also permissible, so long as the lawyer complies with other ethical mandates, such as ensuring that all reasonable efforts are taken to prevent the inadvertent disclosure of confidential information.[17] That flexibility obviously provides welcome relief from what would otherwise be a challenging burden on busy practitioners to meet with clients or have phone conversations with them every time communication is required under the Rules of Professional Conduct. However, that flexibility also has an important caveat: while face-to-face or telephonic contacts are not required for all communications, lawyers must make extra effort to ensure the client receives and understands the communication when the communication is via email or other written format.[18] A lawyer should therefore get confirmation from the client that he received and understood the information, and should ensure the client knows that the lawyer is available for any questions or concerns.[19]

Some lawyers may wish to require clients, as a condition of the representation, to agree to communication via text or email. Such a condition is only permissible if obtained with informed consent from the client, including a full disclosure of the risks of such electronic forms of communication, and an explanation of the reasonably available alternatives.[20]

[16] MR 1.4, Cmt. 3 ("exigency" of circumstances may make communication not feasible prior to lawyer's action); MR. 1.4, Cmt. 4 (communication in response to client request for information can be mere acknowledgement of request where full prompt response not feasible).
[17] MR 1.6(c). Such efforts include getting the client's informed consent to the use of the particular mode of communicatio, and having a confidentiality disclaimer at the end of each communication. *See* ABA FORMAL OP. 477R (2017). Informed consent would require, for example, explaining the risks of using Zoom for video-conferencing.
[18] *See, generally*, Kristin J. Hazelwood, *Technology and Client Communications: Preparing Law Students and New Lawyers to Make Choices that Comply with the Ethical Duties of Confidentiality, Competence and Communication*, 83 MISS. L.J. 245, 265–268 (2014). *See also* CALIFORNIA FORMAL ETHICS OP. 2012-184, (2012) (for internet-only contact with client, lawyer may need to verify client's understanding of communications); VIRGINIA ETHICS OP. 1872 (2013) (lawyer communicating with client via internet portal must have client confirm he has received and understood communication); SOUTH CAROLINA ETHICS OP. 05-16 (2005) (for transactions done with client by mail, such as real estate transactions, lawyer must be accessible to client to explain and answer questions).
[19] Id.
[20] *See supra* n. 17.

Mode of Communication: the Use of Third Parties

Where there is a request for information from a client, non-lawyer staff can and should be used to communicate acknowledgement of a request for information where a more immediate substantive response directly from the lawyer is not feasible.[21] Lawyers should ensure that staff are trained to give an appropriate timeframe for a substantive response directly from the lawyer.[22] Delegating more substantive communication responsibilities to non-legal staff, however, is more fraught. Cases and ethics opinions consistently find violations where lawyers have their non-legal staff act as the ***sole*** communicator with clients, where lawyers give minimal supervision over the content of staff communications with clients and where clients have explicitly requested communication with the lawyer rather than non-legal staff.[23]

It can also be permissible, under very specific circumstances, to communicate with the client through a third person who is not a member of the law firm. Immigration lawyers may often find it more efficient, for example, to communicate through family members of clients. This may be due to the fact that the client is detained and a family member visits the client more frequently, or simply that family members are more available for other reasons such as job responsibilities. Communication through a third party can only be permissible if the lawyer has obtained informed consent from the client, especially with respect to the disclosure of confidential information to the third person.[24] And, significantly, the burden is still on the lawyer to ensure that the client actually receives the communication, understands it, and has the opportunity to ask questions or express concerns.[25]

> *Example: Lawyer represents Client in a removal proceeding. Client is detained at a facility that is several hours from Lawyer's office. Client leaves a message for Lawyer that he would like an update on Lawyer's progress gathering information for an upcoming bond hearing. Lawyer has her paralegal call Client's wife, who visits Client twice each week, and provide her with an update to give to Client at the wife's next visit.*

The plan used in this example to provide information to the client is permissible, but only if certain safeguards are followed. A lawyer, as noted above, can use non-legal staff to answer a request for information so long as the staff is properly supervised and is not tasked with giving advice or other actions that would constitute the unauthorized practice of law. In this example, the lawyer would have to craft the update that the paralegal is sharing; it would not be permissible for the lawyer to merely tell the paralegal to "give Client's wife an update." In addition, it would only be permissible to use Client's wife as a conduit for the update if the lawyer already had obtained the informed consent of the Client to do so; that informed consent would need to include an explanation of how communicating through the Client's wife could affect attorney-client privilege. And finally, the lawyer will have to ensure that her client actually received the information, understood it, and has the opportunity to ask questions.

[21] MR 1.4, Cmt. 4.
[22] Id.
[23] *In re Galbasini*, 786 P.2d 971 (Ariz. 1990) (lawyer disciplined for delegating all communication to nonlawyer staff with minimal supervision); *Mays v. Neal*, 938 S.W.2d 830 (Ark. 1997) (requiring client to communicate only with lawyer's assistant violated Rule 1.4(b) and impermissibly delegated legal work to inadequately supervised nonlawyers); *In re Farmer*, 950 P.2d 713 (Kan. 1997) (violation to tell nonlawyer staff to "handle" returning client's phone calls without further direction); MICHIGAN ETHICS OP. RI-349 (2010) (allowing nonlawyers to handle all communications risks violating Rules 1.1, 1.4(b), 2.1, 5.3(b), and 5.5(b)). *See also* Compendium Chapters on MR 5.3 (Responsibilities Regarding Nonlawyer Assistance) and 5.5 (Unauthorized Practice of Law).
[24] MR 1.6(a). Even where a party provides informed consent, the lawyer still has a duty to ensure that any communications through a third party meet other ethical requirements such as competency and preservation of confidentiality.
[25] *See supra* n. 18.

Mode of Communication: Interpreters

Rule 1.4 implicitly requires the use of an interpreter where necessary for effective communication,[26] and the C.F.R. makes that requirement explicit for immigration lawyers.[27] But the mere use of an interpreter is not sufficient; lawyers also have to make efforts to ensure that the translation is accurate. A lawyer must ensure that the interpreter is qualified and must take corrective action if the lawyer notices that the interpreter appears to be filtering the statements of the lawyer or client or inaccurately interpreting them in some other way.[28]

> *Example: Lawyer is representing a client from Guatemala who does not speak English. Lawyer hires a Spanish interpreter to assist with a meeting where lawyer is explaining Client's various legal options. Lawyer notices that the interpreter will frequently give short three- or four-word translations after Client has spoken for a few minutes. Lawyer also notices that Client and interpreter frequently have brief dialogue back and forth before the interpreter actually interprets a statement.*

The first consideration here is ensuring that the interpreter has sufficient qualifications. This can be done through examining a resume or endorsements from trusted colleagues.[29] The lawyer in this case should also confirm whether Mam or some other indigenous language, rather than Spanish, is the best language for the client. Even if the interpreter is qualified, however, there are clear indications in this case that the translations are not full or complete and the Lawyer must instruct the interpreter to translate everything that is said by Lawyer and Client. If the interpreter continues to summarize statements, the lawyer should find a different interpreter.[30]

Missing Clients

Most lawyers have clients who simply stop responding to calls or letters, or who move away without leaving forwarding information. For immigration lawyers, the question of how to handle communications with "missing" clients is frequently more fraught than for other lawyers. First, recent immigrants to the United States often have temporary addresses when they first arrive. Changes of residence are consequently a more frequent occurrence and can make it more difficult to keep track of clients. In addition, clients of immigration lawyers are almost always required to keep USCIS or the Immigration Courts apprised of changes in their contact information. The failure to do so can have exceptionally harsh consequences, including *in absentia* removal orders, the denial of applications, and the loss of eligibility for certain types of relief. Finally, many immigration matters have long periods of inactivity, which can perpetuate lack of communications between a lawyer and client. Given the high stakes, the questions of the immigration lawyer's duty to track down a missing client to communicate essential information, as well as the question of what actions a lawyer is permitted to take on behalf of a "missing" client, are especially weighty.

> *Example: Lawyer represents Client in DACA renewal applications. Due to status of current DACA litigation, a renewal of Client's DACA status is permitted. However, if the renewal is not submitted prior to the expiration of Client's current DACA status, Client will lose her DACA status, and any related Employment Authorization Document (EAD) will expire. Lawyer reaches out to Client through a phone*

[26] NEW YORK STATE ETHICS OP. 1053 (2015); NEW HAMPSHIRE ETHICS OP. 2009-10/2 (2010).
[27] *See* 8 C.F.R. §1003.102(r) ("It is the obligation of the practitioner to take reasonable steps to communicate with the client in a language that the client understands").
[28] NEW YORK STATE ETHICS OP. 1053 (2015); NEW HAMPSHIRE ETHICS OP. 2009-10/2 (2010).
[29] The use of interpreters and translators also can add to the expense of the representation. If the client will be responsible for this expense, that fact must be communicated to the client, preferably in writing. MR 1.5(b).
[30] There are a numerous practice guides to aid lawyers in working effectively with interpreters. *E.g.*, National Association of Judiciary Interpreters and Translators, INTERPRETING IN A LEGAL SETTING: A GUIDE FOR THE ATTORNEY (2011); N.Y. Office of Court Administration, ATTORNEY'S GUIDE TO WORKING WITH INTERPRETERS AND LIMITED ENGLISH PROFICIENT (LEP) LITIGANTS (2013); Ayuda, WORKING WITH INTERPRETERS OUTSIDE OF THE COURTROOM: A GUIDE FOR ATTORNEYS.

call and letter two months prior to Client's DACA expiration. The phone number is disconnected and the letter is returned with an indication that Client no longer lives at that address.

A lawyer is required to make reasonable efforts to track down a missing client.[31] When the lawyer has important information to convey or intends to take signification action, such as terminating the representation, settling a matter, or filing a lawsuit or petition, reasonable efforts may include internet searches, personal visits, department of motor vehicle searches, emails, or contacting a client's family or friends.[32] In the above example, the issue is a significant one, given that Client would lose her ability to work, as well as her DACA protection. Assuming that Lawyer was hired to provide on-going representation for DACA renewals, a phone call and returned letter are therefore not sufficient to meet Lawyer's duty to communicate with his client, and he must take some additional actions, such as trying to contact Client through known family and friends.[33]

Note also that, while the 8 C.F.R. 1003.102(r) does not require efforts to locate a client beyond using addresses or phone numbers known to the practitioner, state rules often do require more. Thus, while the CFR provision could provide a robust defense to investigations by EOIR or DHS disciplinary counsel into alleged failures to track down a client to the extent ethically required, it would be less sturdy in the face of an ethical complaint being investigated by a state that requires more.

And what should the lawyer do if he cannot contact his client after reasonable efforts? Or if the lawyer does not have time to make more substantive efforts? In general, if there is implied authorization to take an action and there would be a material adverse effect on the client if the lawyer did nothing, then the lawyer can take the action.[34]

Example: The situation is the same as the previous example, except that Lawyer is able to locate Client through Client's family members, and the DACA and EAD renewals are timely submitted. However, Lawyer receives a Request for Evidence (RFE) seeking more information about an arrest referenced in the application. Lawyer knows that the arrest was for a minor matter that will not affect the application and has a copy of the dismissal order from the criminal court. Lawyer reaches out to Client to inform her of the RFE, but the new phone number and address again do not work, and the family members are no longer reachable.

Although there was no explicit consent here to respond to the RFE and send in the order of dismissal, the lawyer may do so as it is impliedly authorized in order to achieve the goal of renewing the client's EAD and DACA status.

One important method of minimizing the occurrence of "missing" clients is to convey very explicitly at the outset of the representation that the client has an ongoing responsibility to inform the lawyer of any change in contact information and even to put language explaining that responsibility in the retainer signed by the client.

[31] ALASKA ETHICS OP. 2011-4 (2011), n. 1 (reasonable efforts to locate missing client may include "attempts to contact the client by telephone, letter to client's last known address, personal visit to the client's last known address, electronic mail inquiry, internet search, post office search, registry of motor vehicle search, or newspaper publication"); ARIZONA ETHICS Op. 01-08 (2001) (reasonable efforts to locate missing client may include writing and telephoning client at all known addresses and phone numbers, and contacting client's family, friends, or acquaintances, including those who may be discovered through diligence); NEW YORK STATE ETHICS OP. 787 (2005) (reasonable efforts may include certified mail to client's last known address, personal visit to last known address, or search of telephone directories, public records, or Internet).

[32] Id.

[33] This does raise some confidentiality concerns, but if the lawyer only reveals information to the friend or family member to the extent reasonably necessary to track down the client, it would almost certainly be considered "impliedly authorized" to carry out the representation. *See* MR 1.6(a).

[34] *See, e.g.*, ALASKA ETHICS OP. 2004-3 (2004) (lawyer may file suit without express authorization from client if statute of limitations date is approaching and lawyer believes prior communications with client conferred implied authorization).

Joint Representation

Immigration lawyers often represent co-clients in the same matter, such as multiple family members in family-based petitions, or employers and employees in work-related visas. Joint representation poses some special challenges with respect to a lawyer's communication responsibilities. In particular, joint representation can cause problems when one client asks the lawyer not to communicate certain information to the other client.

> *Example: Lawyer represents mother and child in joint removal proceedings. Child is 16. Mother says she is planning to take voluntary departure on her case, but asks Lawyer not to tell child.*

Lawyers have the same duty of confidentiality and communication to each co-client.[35] This presents a problem in the scenario above: if Lawyer discloses the information, it may violate her duty of confidentiality to the mother; if she does not disclose the information, it may violate her duties to keep the child reasonably informed about the status of the case and to explain the matter to the extent necessary to permit the child to make informed decisions. The lawyer may have no choice but to withdraw from the representation of both clients.[36] If, however, the clients have provided informed consent that certain information or types of information may be kept confidential from one client or the other, then the representation could be permissible.[37] At a minimum, lawyers who regularly represent co-clients should include, at the outset of the representation, a process for obtaining informed consent from both clients about what information will be shared between clients and what information will not be shared.[38] Even with that informed consent, the dual representation can get exceedingly complex if one client revokes previously granted consent.

Withholding Information

Rule 1.4 allows lawyers to delay providing information to clients in some circumstances.[39] Most commonly, the question of withholding information arises where the disclosure would cause legitimate concern for the safety of the client,[40] there are real national security concerns,[41] or there are statutory prohibitions on disclosing certain information.[42] Sometimes, however, a court rule or order may be issued that explicitly prohibits a lawyer from disclosing certain information to her client, creating a conflict with the lawyer's obligation under Rule 3.4(c).[43] What should a lawyer do where she feels that she is obligated by Rule 1.4 to communicate information that a court rule orders her not to disclose? To comply both with her duty to obey court rules, as well as her duty to communicate important information to her client, the lawyer may have to disobey the court rule, which she is permitted to do if she does so openly based on an assertion that the court rule does not create a valid obligation on her part.[44]

Pandemics, Environmental Disasters, and Similar Crises

In the event of environmental disasters such as hurricanes or earthquakes, global pandemics such as Covid-19, or other similar crises, the ability to communicate with clients can be severely impaired. In such times of crisis, lawyers should continue to maintain clear and regular communications with clients; indeed, there may be additional matters

[35] MR 1.7, Cmt. 31 (the lawyer has an "equal duty of loyalty to each client" in common representation).
[36] ABA FORMAL ETHICS OP. 08-450 (2008). *See also* MASS. ETHICS OP. 09-03 (2009) (lawyer representing employer and employee must tell employer that employee's authorization has been revoked even where the employee asks him not to and the lawyer believes employer does not want to be told).
[37] MR 1.7, Cmt. 31.
[38] MR 1.7, Cmt. 31. *See* Compendium Chapter 1.7 for an in-depth discussion of conflict waivers.
[39] MR 1.4, Cmt. 7.
[40] Id.
[41] WASHINGTON ETHICS OP. 2134 (2007)
[42] NORTH DAKOTA ETHICS OP. 15-06 (2015).
[43] MR 3.4(c).
[44] Id.

of importance that require updates. For example, clients may not be aware of court and agency closures, and consequent delays to their cases. Lawyers should also anticipate how communications can continue in times of crisis prior to the event and consider providing clients with methods by which the lawyer may be reached in the event that emergency communication is necessary.[45] This information can be provided if it appears that a crisis is imminent or can even be contained in a fee agreement or an engagement letter.[46]

Lawyers also must be flexible in times of crisis. Safe communication with a client battling Covid-19 or another highly communicable illness will almost certainly be remote. Lawyers should develop the competence to responsibly take advantage of forms of communication, such as video-conferencing and remote notarization, that do not require in-person contact. Other significant ethical obligations related to communication that may come into play during times of crisis include diligently following developments in how courts and agencies are handling matters, *see* MR 1.3 (Diligence); ensuring that the lawyer is adequately trained to handle remote technologies used by courts and agencies, *see* MR 1.1 (Competence) and MR 1.6(c) (obligation to take reasonable efforts to prevent inadvertent disclosure of confidential information); dealing appropriately with a client who has become incapacitated, *see* MR 1.14 (Client with Diminished Capacity); and, especially for sole practitioners, preparing a plan in the event of the lawyer's death or incapacity, *see* MR 1.3, Cmt. 5.

Substance of Communication

Scope of Duty to Communicate Generally

Rule 1.4 does not merely require communications with a client, it also describes the broad scope of the substance of those required communications. Rule 1.4(a)(1) requires communication about any matter where the client's informed consent is necessary; Rule 1.4(a)(2) requires communication about the means which will be used to achieve the client's objectives; Rule 1.4(a)(5) requires communication about limitations on the lawyer's conduct; and, most sweeping of all, Rule 1.4(b) requires communicating whatever is necessary to "ensure the client can make informed decisions regarding the case."

Rule 2.1 also provides broad and important guidance on the content of required communications, specifically in the area of providing advice. Rule 2.1 mandates that lawyers provide independent and candid counseling that goes beyond merely "technical" legal advice and includes difficult topics that a client may prefer not to discuss but relate to the representation.[47]

These rules, as well as ethics opinions and case law, address these and other explicit subjects that a lawyer must communicate, including explaining a lawyer's mistake, reviewing adverse consequences to admissions or other actions, and advising a client on whether a proposed action is criminal or fraudulent.

Matters Requiring Client's Informed Consent

Rule 1.4(a)(1) explicitly requires lawyers to inform clients promptly about any matter requiring the client's informed consent.

> *Example: Lawyer represents Client in a removal proceeding. Client is charged with removability under INA §212(a)(7)(A)(i)(I) (illegal entry) and INA §212(a)(4)(A) (likely to become a public charge). Lawyer and Client have discussed the possibility of conceding to the allegations regarding illegal entry if the government attorney is willing to agree to administratively closing the case while Client pursues a U-visa. At the first Master Calendar hearing, prior to the case being called, the government lawyer agrees to*

[45] *See* ABA FORMAL OP. 482 (2018)
[46] Id. *See also* Michigan State Bar ethics guidance at https://www.michbar.org/opinions/ethics/COVID-19.
[47] MR 2.1, Cmts. 1, 2.

support an administrative closure if Client concedes to all the allegations in the Notice to Appear. The case is called, but just before conceding the allegations, Lawyer reviews them a final time and realizes she has only received permission from Client beforehand to concede to the illegal entry allegations, not to the public charge allegations.

Lawyer can concede the allegations regarding illegal entry because she obtained informed consent beforehand. Rule 1.4 explicitly permits obtaining informed consent beforehand to any proposed resolution to a matter.[48] Lawyer cannot, however, concede the public charge allegations without first communicating with the client, because the consequences of that admission must be communicated to ensure informed consent is obtained.

Limitations on Lawyer's Conduct

Rule 1.4(a)(5) explicitly requires a lawyer to communicate to the client about any ethical or legal limitation on the lawyer's conduct where the client expects the lawyer to take actions that violate ethics rules or other laws.

Example: Client has obtained affidavits from witnesses in support of Client's claim for political asylum. Lawyer is suspicious about the authenticity of the signatures on the affidavits and asks Client how they were obtained. Client says that he signed the affidavits himself for the witnesses because he was not sure they would be willing to sign them out of concern for their own safety. Client also expresses that he expects Lawyer to submit the affidavits with the forged signatures because he knows that the witnesses would agree with the content.

Submitting the affidavits with the forged signatures would violate Rule 3.3(a)(3).[49] The lawyer's ethical obligations, however, go beyond merely a refusal to submit the documents. In this scenario, the client is expecting the lawyer to submit fraudulent documents. Under Rule 1.4, therefore, the lawyer also has an obligation to explain to her client that she is ethically prohibited from submitting the affidavits and will not do so.[50] Indeed, under Rule 2.1, the lawyer is further obligated to render candid advice to her client here on the legal risks and even the moral factors relevant to submitting fraudulent documents.[51]

Explaining a Lawyer's Mistake

All lawyers make mistakes in the course of their practices. Though not every mistake constitutes an ethical violation, a lawyer's failure to communicate with a client about an error can itself be a violation if either the error is reasonably likely to harm or prejudice the client's interests or the error is of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice.[52] No similar duty exists to a former client if the material error is discovered after the representation is terminated.[53]

[48] MR 1.4, Cmt. 2 (resolutions of cases such as settlements and pleas are matters requiring informed consent that typically must be communicated promptly to clients, unless client has previously indicated agreement to resolution).
[49] MR 3.3(a)(3) (a lawyer may not offer evidence she knows is false. Here, the signatures are forged).
[50] Under MR 2.1 (Advisor), the lawyer here might also wish to provide independent and candid advice to her client related to the submission of forged documents.
[51] MR 2.1 (lawyer shall render "independent" and "candid" advice to client, and may refer to "moral" considerations).
[52] ABA FORMAL OP. 481 (2018). *See also* MINNESOTA FORMAL ETHICS OP. 21, 25 (2009) (if lawyer knows his error could reasonably support client's claim for malpractice and if claim materially affects client's interest, lawyer must inform client of error); COLO. ETHICS OP. 113 (2005) (lawyer must inform client of all material adverse developments, including lawyer's own errors); NORTH CAROLINA ETHICS OP. 2015-4 (2015) (lawyer must promptly tell client if error materially prejudices client's interests or could constitute malpractice). *See* Compendium Chapters 1.1 and 1.3 for detailed discussions of when a mistake constitutes an ethical violation.
[53] ABA FORMAL OP. 481 (2018).

Even aside from the ethical rule, it is best practice to keep a client informed of mistakes. Most lawyers find that clients are often willing to forgive inadvertent errors, especially where the representation has otherwise been diligent and where a strong attorney-client relationship has been formed through open and clear communication.

> *Example: Lawyer is assisting Client with an Employment Authorization Document (EAD) renewal application. Lawyer forgets to submit a copy of the current EAD and receives an RFE. Lawyer quickly submits the copy, but is concerned that the new EAD may not arrive prior to the old EAD's expiration date.*

Because the error in this scenario could impede the Client's ability to work with authorization – thereby prejudicing an important interest of the client – the lawyer must inform the client of the mistake. The duty to report errors to the client gets more complicated, however, where the error may provide the basis for a subsequent ineffective assistance of counsel or malpractice claim. In those situations, the lawyer has a conflict of interest between advising the client about the possibility of those claims and the lawyer's own personal interest in not being subjected to them.[54] The safest course of action will be to refer the client for consultation with a separate unaffiliated lawyer to get "detached" advice about pursuing such claims.

Explaining Adverse Consequences

Another topic of communication not explicitly mentioned in Rule 1.4, but crucial to ensuring the client makes informed decisions regarding an immigration case, is the potential adverse consequences to making certain admissions or pursuing various claims in the course of representation. In the context of pleas in criminal matters, there is a well-established constitutional duty on the part of lawyers to explain possible adverse immigration consequences to the plea.[55] The *ethical* duty regarding proper communication about adverse consequences, however, applies much more broadly than merely in criminal matters. That duty includes advising, in criminal as well as non-criminal matters, about the possibility of legal liability, the risk of criminal prosecution, and the waiver of legal rights.[56] In the immigration context, where there is a minefield of severe adverse consequences to so many admissions and other litigation decisions, lawyers must be especially vigilant.

> *Example: Lawyer represents Client who does not currently have status in the United States and is considering pursuing an affirmative asylum application. Lawyer has used an interpreter to ask Client, who does not speak English, whether Client has any criminal history or pending matters. Client has consistently said "no," but just before the application is filed, Client discloses to Lawyer that he has in fact had an order of protection issued against him. When Lawyers asks Client why he is only now disclosing this information, Client says he did not previously know that he was being asked about old cases.*

The client in this case cannot make an informed decision about whether to pursue an affirmative asylum application and consequently bringing himself to the attention of immigration authorities unless he is properly informed about the risks of doing so. In this scenario, especially, where there is an order of protection that might make Client inadmissible, the lawyer needs to gather more information so that she can advise the client fully and properly on

[54] MR 1.7, Cmt. 10 (where the "probity" of the lawyer's own conduct is in question it may be "difficult or impossible for the lawyer to give the client detached advice.").
[55] *Padilla v. Kentucky*, 559 U.S. 356 (2010).
[56] *Att'y Grievance Comm'n v. Snyder*, 793 A.2d 515 (Md. 2002) (Rule 1.4 violation where lawyer failed to explain implications of DWI case adequately to client); *In re Cohen*, 82 P.3d 224 (Wash. 2004) (Rule 1.4 violation where lawyer transferred case to mandatory arbitration without informing client of possible adverse financial consequences); ABA FORMAL ETHICS OP. 02-425 (2002) (lawyer is required to explain disadvantages of arbitration clause, including that arbitration often results in client's waiver of significant rights, including right to jury trial, broad discovery, and appeal). *See also In re Winkel*, 577 N.W.2d 9, 11 (Wis. 1998) (noting that the lawyer in a business transaction should have explained to his clients the risks of criminal prosecution associated with the "surrender of business assets to the bank"); *Smith v. St. Paul Fire & Marine Ins.*, 366 F. Supp. 1283, 1290 (M.D. La. 1973), aff'd, 500 F.2d 1131 (5th Cir. 1974) (noting that while a lawyer is not required to advise a client of every possible alternative, he must advise a client of alternatives where adverse consequences may result).

the possible adverse consequences of submitting the application. There are two challenges here for the lawyer. First, the language barrier has created a situation where the lawyer could not herself judge the nuance of the interpreter's questions and the Client's answers, and therefore had a diminished ability to ensure that the Client's disclosures were sufficiently accurate. Finding interpreters for conversations and translators for documents who can be trusted to interpret and translate expertly, while often difficult, is essential to competent client representation. Second, properly advising on adverse consequences is one of the most challenging aspects of proper representation and requires a high level of competence; diligent questioning and investigation so that the lawyer's advice can be based on full factual information; ongoing training to ensure the lawyer is kept abreast of important legal developments; and regular consultation with colleagues with expertise in other relevant areas of law, such as criminal and family law, that may affect and be affected by immigration matters.[57]

Explaining Criminal or Fraudulent Courses of Action

Like all lawyers, immigration lawyers will occasionally have clients who seem to be asking for counseling about fraudulent or criminal courses of action. Rule 1.2 (Scope of Representation) clearly prohibits a lawyer from counseling a client to engage in criminal or fraudulent conduct, though it permits a discussion of the legal consequences of such conduct.[58] And Rule 1.4 requires a lawyer to explain a matter to the extent necessary for the client to make informed decisions.[59] How do these two provisions interact when a client asks a lawyer to explain illegal or fraudulent courses of action?

> *Example: Client, a U.S. citizen, consults with Lawyer about filing a family-based petition. Client explains that he is good friends with a fellow student at college and the friend would like to marry Client in order to become eligible to adjust status based on marriage. Lawyer explains that an adjustment based on marriage is possible, but that the marriage must be a bona fide marriage, and not a sham. Client then says to Lawyer: "Ok, I understand that. You know, we aren't really in love or anything, and we don't plan to spend our lives as a married couple, it's just that I really want to help her out. So if my friend and I decided to pursue this anyway, even though it's what you call a 'sham,' what kind of things should we be ready to answer at an interview with immigration so that they think we're getting married for love?"*

With a typical client who is not pursuing a fraudulent claim, the lawyer would certainly let the client know what type of questions to expect and what type of evidence to prepare to present. That advice would in fact be ethically required.[60] The client in this scenario, however, appears to be asking for information that he plans to use to commit fraud. And if the lawyer does believe that the client plans to commit fraud, she is not ethically required to answer the client's question on how the marriage-based adjustment interview proceeds. She can simply tell the client she refuses to answer the question and that pursuing the application would be fraud.

While not *required* to do so, however, the lawyer *may* answer the client's question if she is extremely careful to stay on the right side of the line between explaining how an interview in a marriage-based application proceeds on the one hand and advising or assisting the client in submitting a fraudulent petition on the other. The lawyer may therefore explain how an interview typically proceeds, so long as she also makes clear (without a cynical wink on the side): (1) the consequences to the client and the client's friend of pursuing a fraudulent marriage-based

[57] *See generally* Theo Liebmann, *Adverse Consequences and Constructive Opportunities for Immigrant Youth in Delinquency Proceedings*, 88 TEMPLE L. REV. 869 (2016).
[58] MR 1.2(d).
[59] MR 1.4(b).
[60] MR 1.4(a)(4) (responding to client's request for information); MR 1.4(b) (explaining matter to client). Lawyers must be particularly diligent about checking any criminal statutes that might bear on the issue of permissible explaining vs. illegal aiding and abetting. *See generally U.S. v. Sineneng-Smith*, 590 U.S. ____, 140 S.Ct. 1575 (2020) (case remanded on other grounds where lawyer challenged as impermissibly vague the provisions of 8 U.S.C. 1324(a)(1)(A)(iv) and (B)(i) that criminalize "encouraging or inducing an alien to reside in the country, knowing and in reckless disregard of the fact that such residence is in violation of the law").

adjustment petition; and (2) that neither she nor any other lawyer would be ethically permitted to assist the client with a fraudulent application.[61] Only by explaining the consequences of a fraudulent or criminal action[62] and also offering candid advice about the ethics and morals of the proposed criminal or fraudulent action,[63] can a lawyer answer a question like the one from the client above. In fact, a full candid counseling session, as opposed to simply refusing to answer the client's question, often effectively dissuades a client from committing fraud.

Means vs. Objectives

Rule 1.4 requires whatever communication is necessary to ensure a client can "participate intelligently in decisions regarding the objectives of representation and, to the extent the client is willing and able, the means to achieve those objectives."[64] Importantly, the Rule does not give the client blanket control over determining the means of achieving the goals and, in fact, the lawyer controls most, though not all, means-related decisions.[65] Decisions related to "means" that require consultation with the client include general strategy, the prospects of success, and tactics that might be expensive or hurt a third party.[66]

> *Example: Lawyer represents Client in a domestic violence-based asylum claim. Client has explained that her teenaged daughter witnessed some of the incidents. Lawyer is concerned about whether Client will testify effectively and plans on calling Client's daughter, who was present during some of the most violent incidents, as a corroborative witness. The daughter is willing to testify, but expresses that she was traumatized by the events and is worried about how she will react emotionally to re-telling the events and being subjected to cross-examination.*

Initially, in order to meet her communication duties under 1.4 to consult about the means of achieving the client's objectives, the lawyer here must consult with her client about the possibility of calling the daughter as a witness, fully explain why calling the daughter as a witness will make the case stronger, and discuss the daughter's concerns. Ultimately, the decision on whether to call the daughter as a witness will be the client's to make. Though this is certainly a decision about means, rather than objectives, it could have an adverse effect on another person and therefore it falls under one of the categories of decision that is more likely to be deferred to the client.[67]

C. Hypotheticals

***Caveat*:** The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: Responding Promptly to Clients

Belinda hires Naomi, an immigration lawyer, to file an I-130 petition for Belinda's mother, Petra. USCIS approves the I-130 and sends a notice that Naomi also emails to Belinda and Petra. Upon receiving Naomi's email, Belinda responds via email and requests that Naomi send her a copy of her I-130 petition and supporting documentation. Naomi decides that she has more pressing business and that sending Belinda a

[61] MR 3.3(a)(3).
[62] MR 1.4(b), 1.2(d).
[63] MR 2.1.
[64] MR 1.4(a)(2); 1.4(b); Cmt. 5.
[65] MR 1.2, Cmt. 2 ("Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters.")
[66] Id.
[67] MR 1.4, Cmt. 5; MR 1.2, Cmt. 2 (lawyers typically defer to client on tactical decisions that involve significant expense to client or possible adverse effects on others).

copy of the petition is not a priority. In deciding not to comply immediately with Belinda's request, Naomi considers the fact that Belinda and Petra retained the originals of the supporting documents for the I-130. After not replying to Belinda for a week, Naomi receives a telephone call from her now irate client. Has Naomi violated Rule 1.4?

Analysis

While Naomi's approach to responding to Belinda's inquiry within a week indicates a lack of professionalism that risks severely damaging her relationship with her client, it does not quite yet violate Rule 1.4. Naomi is, however, on the cusp of an ethical violation already and, if she ignores Belinda's request much longer, will likely cross the boundary from unprofessional to unethical.

The question here has two parts: (1) whether Belinda's request for information was reasonable; and (2) whether Naomi's failure to respond to that request for (at least) a week constitutes a failure to "promptly" reply. Belinda's request for a copy of the I-130 petition and supporting documentation was undoubtedly reasonable. Naomi's apparent assumption that Belinda did not need a copy of the petition because she and Petra had kept the original documents is not justified, because the petition is certain to contain information Petra may need to complete and submit her immigrant visa application. Even aside from that, it is not unreasonable for a client to want her own copies of all forms filed on her behalf. Because Belinda retained the originals of all documents submitted in support of the I-130, however, it would certainly be reasonable for Naomi to say something like "I am sending you the I-130. I believe you already have the originals of the supporting documents. I will not copy these attachments unless you feel that you really need them."

The question then becomes whether the weeklong delay in complying with Belinda's request is sufficiently "prompt." Here, the information requested was a copy of the I-130 petition that had been granted; there is little substantive harm in not responding to that request within a week. Naomi had already forwarded notice of USCIS's approval of the I-130 petition to Belinda and Petra. There is no doubt, however, that the failure to respond to the request sooner shows a lack of professionalism. At the very least, Naomi or a member of her staff should have replied to Belinda's email to acknowledge her request and estimated a date for compliance.[68] In addition, to avoid future miscommunications, Naomi may want to consider automatically mailing clients a courtesy copy of their benefits application upon filing with USCIS.

As discussed *supra*, the analysis is slightly different where there is an environmental disaster, global pandemic, or similar crisis in play. In those situations, where a lawyer cannot get into the office and has no staff, sending the requested documents out after a week is reasonable. Of course, the lawyer still needs to communicate to the client her inability to comply promptly.

Hypothetical Two: Communicating about Procedural Issues

Sascha and his wife Daria retain Misaki to file a marriage-based adjustment of status case for Daria, with Sascha as the sponsor. After filing the case, Misaki receives a notice from USCIS for Daria to appear for her biometrics appointment. Misaki promptly emails Daria to remind her to appear on the date and time specified in the notice. Acting on the assumption that Daria received the same notice, Misaki decides not to attach a copy of the notice to her email. Unbeknownst to Misaki, Daria and Sascha have moved across town and do not receive notice from USCIS in time for Daria's appointment. Relying solely on Misaki's email, Daria arrives at her biometrics appointment without a copy of the notice. After waiting nearly an hour for USCIS to verify her appointment, Daria is finally allowed into the building. Daria is upset that

[68] MR 1.4 Cmt 4.

Misaki did not email her a copy of the biometrics notice or call her to discuss the procedure for appearing for biometrics. Has Misaki violated Rule 1.4?

Analysis

Assuming that she had not previously gone over those biometrics appointment procedures with Daria, Misaki's failure to do so here constitutes a violation of Rule 1.4.

Misaki is required under Rule 1.4 to ensure that Daria is kept reasonably informed about the status of her marriage-based adjustment of status matter. Completing the biometrics appointment is an important milestone in Daria's adjustment case. When Misaki received the biometrics notice, she sent an email to Daria to ensure that she would appear at the appointment. Misaki's email was reasonably calculated to put Daria on notice of her appointment. Indeed, Daria acted on Misaki's instructions by going to USCIS on the right date at the correct time.

But the email by itself wasn't enough to meet the requirements of Rule 1.4. In order to keep Daria "reasonably informed," Misaki should also have ensured that Daria knew what the process was, particularly the need to bring the notice and picture identification with her. This hypothetical also provides a clear illustration of the importance of communication – by communicating about what the notice states Daria should bring to the appointment, Misaki would have quickly learned that Daria did not receive a copy of the notice and no longer lived at her previous address.[69]

In addition, Misaki should advise (or, if she has done so already, re-advise) her clients to keep her office informed of any change of address during the representation. Although lawyers do have some duty to locate a "missing client," it is clearly preferable for both lawyer and client to make sure that they have updated contact information.

Hypothetical Three: Explaining an Ineffective Assistance Claim

Mohammad comes to see Lawyer Two to sort out his immigration problems. Mohammad's first lawyer, Lawyer One, filed an adjustment of status (AOS) application based on an EB-1C employment-based visa. Twelve months after the application was filed, Mohammad received a denial and a Notice to Appear (NTA) in the U.S. mail. He noticed a copy had been sent to Lawyer One. The denial was based on Mohammad's failure to respond to a Request for Evidence (RFE). The denial stated that an RFE had been issued and sent to Mohammad's attorney six months after the AOS was filed and indicated that the RFE requested proof that the company where Mohammad was working had a qualifying relationship with a foreign company.

Mohammad tells Lawyer Two that he called Lawyer One repeatedly – at least a dozen times – over the twelve-month period that the case was pending. Sometimes when he called, a person answered the phone. Mohammad asked the person about the status of his case. The person put Mohammad on hold and when he returned to the phone, he told Mohammad: "I spoke with Lawyer One, he told me to tell you that the case is pending. We will contact you when we receive an interview notice."

Mohammad also left messages on Lawyer One's voicemail. His calls were never returned. Mohammad also sent email messages to Lawyer One. In response to the emails, Mohammad received an email from Lawyer One that stated: "USCIS is very backed up right now. The processing time for adjustment of status applications is 13.5 to 20 months. Because your case is within the processing time, it is not possible to do an inquiry."

[69] MR 1.4, Cmt. 1 (reasonable communication is necessary for effective representation).

Lawyer Two reviews the USCIS documents and confers with Mohammad about the company where he worked. Lawyer Two ascertains that the company where Mohammad was working had a qualifying relationship with a foreign company and that documentation establishing the relationship is available. During the consultation, Mohammad provides printouts from the cell phone company showing that he had made one call per month to the lawyer's published telephone number. Half of the calls were under roughly two minutes, and the other half were 4 to 5 minutes. Mohammad explains that the shorter calls were the ones where he left a message on voicemail as opposed to speaking with the receptionist. Mohammad also has printed the responses to his emails. Because it will be very difficult for Mohammad to get time off to go to court, he would like to terminate the NTA and file a motion to reconsider the denial of his adjustment application. What course of action should Lawyer Two pursue?

Analysis

Lawyer Two has an obligation to explain Mohammad's options to him so that Mohammad can make an informed decision about what courses of action are available and which course of action to pursue.[70] Here, Mohammad's strongest option is to promptly file an I-290 motion to reopen the application based on the evidence of the qualifying relationship with a foreign company, as well as the evidence showing ineffective assistance of counsel by Lawyer One.[71]

The evidence of ineffective assistance of counsel appears to be strong and very likely to meet the standard under *Lozada*.[72] Lawyer One's failure to submit the documentation of the relationship with the foreign company constitutes a violation of Rule 1.1 (Competence), and his failure to respond to the RFE violates both Rule 1.1 and Rule 1.3 (Diligence). In addition to obvious competence and diligence violations by Lawyer One, there are also clear violations of Rule 1.4. Lawyer One failed to promptly return Mohammad's reasonable requests for information and did not keep Mohammad reasonably informed of the status of the matter; in fact, Lawyer One provided incorrect information to Mohammad regarding the status of his application.

To pursue an ineffective assistance claim will require that Lawyer One be informed of the allegations made by Mohammad and be given a chance to respond. It will also require that a disciplinary action or similar complaint be filed against Lawyer One.[73] And Lawyer Two should be sure to have a complete record to ensure any ineffective assistance claim has been diligently investigated.[74] All of these steps will require a time investment by Mohammad, who has said it is difficult for him to get time to go to court. Lawyer Two should thoroughly explain the procedures, consequences, and, especially, timelines of pursuing the ineffective assistance claims to Mohammad, as well as what will likely happen if Mohammad does not pursue this course of action, so that Mohammad's decision is fully informed pursuant to 1.4(b).

Hypothetical Four: Reviewing a Client's Options Thoroughly

Noel is a student from Russia in the United States. He is working on a four-year degree in computer programming. Noel is in valid F-1 status and he will finish his Optional Practical Training (OPT) in the

[70] MR 1.4(b).
[71] *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1998). Note, however, that courts have held that the 5th amendment right to effective assistance may not apply to representation prior to a removal proceeding. *See e.g. Contreras v. AG*, available at https://caselaw.findlaw.com/us-3rd-circuit/1590456.html. This limitation would also have to be part of Lawyer Two's counseling of Mohammad.
[72] There must be showing that prior counsel provided ineffective assistance and that the ineffective assistance caused prejudice, and a set of procedural requirements must be followed. Id.
[73] Although *Lozada* does say the claim must merely reflect whether an ethics complaint has been filed and, if not, why not, practically speaking it is extremely difficult to pursue a *Lozada* claim without filing such a complaint.
[74] Indeed, sometimes prior counsel will cooperate with the filing and admit errors.

coming months. Noel is desperate to stay in the U.S. because, as a gay man, he believes he will be persecuted in Russia. Noel is uncomfortable talking about his sexual orientation.

Noel goes to the office of Frank, an immigration lawyer who has a business immigration practice. During the consultation, Frank and Noel discuss Noel's school program and his OPT job. Noel asks Frank whether he will be able to transition to another visa, such as an H-1B, without having to leave the U.S. Frank responds, "Start looking for a job immediately and if you find a company willing to file an H-1B petition on your behalf, and you are selected in the H-1B lottery, and it happens before the end of your OPT, you should be able to change status and not return to Russia. And even if the timing doesn't work out and you have to leave, as long as you have an employer willing to sponsor you, we will be able to get you back here through consular processing in Russia. You won't be there long." Noel responds, "I am afraid for my safety in Russia. I can't go there, even for a short time." Frank says, "Let's cross that bridge when we come to it; in the meantime, find a job."

Noel follows Frank's advice and looks for a job, but does not get any offers. Noel returns to Frank's office to tell him he has not found a job. Frank tells him that he should keep looking, but he should be aware that at the end of his OPT, he will have sixty days to leave the U.S. Noel repeats, "I cannot return to Russia." Frank says, "I am not a miracle worker…if you can't find an employer-sponsor, you won't be able to stay here. You should keep looking and then we will get you an appointment at the U.S. consulate in Russia. Or perhaps we can get you a B-1/B-2 visa at the U.S. Consulate." Noel's eyes tear up as he says, "I can't go to Russia. They'll kill me." Frank does not ask any additional questions. Eventually, Noel is unable to transition to an H-IB petition and he remains in the U.S. without lawful status and works without authorization. Has Frank violated Rule 1.4?

Analysis

Frank has violated Rules 1.1 (Competence) and 1.3 (Diligence) by not asking sufficient questions regarding a potential asylum application, in spite of repeated indications from Noel that such an application could be viable. Those violations, in this case, also lead to a violation of Rule 1.4: Frank's failure to inquire diligently and competently about Noel's situation directly lead to his failure to provide Noel with a sufficient explanation of his possible options for remaining in the United States.

Immigration lawyers may have specific areas of practice on which they focus, but that does not absolve them of a responsibility to assess a client's entire legal situation diligently and competently. Here, Frank could have done one of the following after first hearing about Noel's fear of returning to Russia: ask follow-up questions to assess asylum eligibility; consult with a colleague with the expertise to do the assessment; or refer the case immediately to a lawyer with asylum expertise to do the assessment, with a clear explanation to Noel of the one-year asylum filing deadline.[75] Frank took none of these actions and consequently violated his duties of competence and diligence.

The competence and diligence violations directly led to a violation of Rule 1.4. A lawyer must discuss with her client the possible means of achieving a client's objective[76] and must explain those options with sufficient detail so that the client can make an informed choice.[77] In this hypothetical, Noel's goal – repeatedly stated by him – is to remain in the United States with legal status, without having to return to Russia. Frank has an obligation to talk with Noel about his plausible means of accomplishing those objectives. One plausible mean may be Frank's H-1B plan, but another one is asylum. As noted above, if Frank does not feel competent enough to assess and advise Noel

[75] MR 1.1, Cmt. 2 (lawyer's own preparation and study, or association with lawyer competent in a field, required where legal problem is less familiar to lawyer).
[76] MR 1.4(a)(2).
[77] MR 1.4(b).

regarding the asylum option in sufficient detail, he needs to educate himself about asylum law, consult with a colleague who does have that expertise, or refer the case to a competent lawyer.

Another permissible alternative would be for Frank to make clear at the outset of the representation that he will only be advising Noel about his ***business-related*** immigration options. That limitation of the scope of representation would have to include informed consent, preferably in the retainer or a written waiver, to the potential risks in only getting advised on business-related immigration options.

Hypothetical Five: Disclosing a Supervisor's Error

Sam has just passed the bar exam and has accepted employment as an associate attorney with Bob Smith, a senior and well-respected immigration lawyer.

Shortly after Sam starts work at Bob's firm, two friends of his, Dietrich and Sheila, stop by the office to say "hello" to Sam and congratulate him on the new job. Dietrich and Sheila are married. As Sam knows that Dietrich is a citizen of Germany and that Sheila is a U.S. citizen who would like to sponsor Dietrich's green card application, Sam introduces the couple to Bob. Bob talks with them about the immigration process, after which Dietrich and Sheila retain the law firm. A few days later, Bob begins gathering the appropriate documentation from the couple.

In the following weeks, Bob's behavior at the office starts to become erratic. He often appears forgetful and sleep-deprived, and he begins inexplicably lashing out at his longtime secretary. The secretary later abruptly quits the firm. Sam continues working on the same large batch of cases that he had been assigned right after joining the firm.

One afternoon about three months after Dietrich and Sheila first met with Bob, Dietrich phones the office, and Sam answers. Dietrich says that he has been trying to reach Bob for several weeks by email and that Bob has not responded. He asks Sam for a status update on his case. Sam puts Dietrich on hold and retrieves the case file. Upon opening the file, Sam immediately sees that the application package that was filed with the government, a copy of which is in the file, is riddled with obvious typographical errors. He also sees that the application itself was mailed to the government only three days prior, not two months ago as Dietrich seemed to believe. While Sam is looking at the file but before he can explore it in more depth, Bob steps out of his office and asks who is on the phone. After hearing that it is Dietrich, Bob tells Sam to explain to Dietrich that the case is pending and that everything is under control. "If he has any questions beyond that," says Bob, "Tell him that I'll phone him later this week." Bob then goes back into his office and closes his door.

What should Sam do?

Analysis

The first thing Sam should do is tell Dietrich someone will call him back after he has had a chance to gather some more information on the status of the case. He simply does not have enough information or, as a new lawyer, the expertise, to provide the level of information to which Dietrich is entitled. The ideal course of action at that point would be the following: (1) Sam speaks with Bob about Dietrich's concerns, (2) Bob takes them seriously, (3) Bob says he will address them, and (4) Bob follows up with Dietrich and gives an accurate report on the status of Dietrich's case.

It appears, though, that this reaction by Bob is unlikely, given his recent behavior and his cursory response to Sam when Dietrich was on the phone.[78] If Bob does not return Dietrich's call and address his questions, then Sam is in a tough spot. Even if Bob continues to tell Sam not to communicate with Dietrich about the status of his case, Sam must nevertheless ensure that such communication happens, either from him or another lawyer at the firm. The fact that Sam is a junior attorney does not relieve him of any of those responsibilities. Under Rule 5.2 (Responsibilities of a Subordinate Lawyer), Sam is bound by the rules of professional conduct, regardless of whether he is acting at the direction of another.[79] Many immigration lawyers begin their legal careers at small firms, where they are especially dependent on the mentorship and guidance of only one or two senior colleagues. It is absolutely essential that new lawyers in that situation understand that they have an independent obligation to ensure the ethical representation of clients and cannot merely defer to senior colleagues.[80] In addition, because Sam does not necessarily have the level of experience to communicate the information competently, Sam may have to consult with other colleagues to ensure the information is fully and accurately communicated by him or a colleague at the firm.[81]

And what exactly should be communicated to Dietrich? What Sam has already discovered is that the application was submitted with numerous typos and that it was submitted nearly two months after Dietrich believed. Do these pieces of information need to be communicated to ensure Dietrich is kept "reasonably informed" about the status of his case and to respond to his request for information? If the typos are sufficiently egregious that the best course of action is to submit revised forms and documentation, then letting Dietrich know about the consequent delay will be required (especially, but not solely, since his signature on the new documentation might be necessary). The ABA's 2018 guidance on this question in Formal Opinion 481 find that that there must be a material error for there to be an obligation to reveal to the client.[82] A lawyer error that could materially prejudice the client's interest must therefore be communicated to the client; if the errors here could prejudice the likelihood of a quick and efficient adjudication of the application, then the error must be communicated. Note that, even if an error is not material, a lawyer should always consider whether it would nevertheless be prudent to reveal it to the client to avoid possible later damage to the lawyer-client relationship. Finally, regardless of the typos, it is definitely necessary to inform Dietrich of the actual date the application was submitted, as this two-month discrepancy may be significant to Dietrich and his family for a variety of personal or practical reasons.

One final question: What obligation does Sam have to communicate Bob's "erratic behavior" to other clients of the firm? In at least some jurisdictions, where lawyers believe a colleague at the firm is impaired in a manner that affects the representations, that concern must be communicated to clients.[83] There does not yet appear to be sufficient evidence here of impairment to justify notifying other clients of the firm, but Sam should consult with more senior colleagues at the firm to ensure Bob's behavior is closely monitored. Unfortunately, calling out a supervisor's unethical behavior can be a real risk for junior lawyers. Firms may be more likely to support a senior colleague and the fallout to the junior lawyer's career could be harsh. Where a junior lawyer has concerns about approaching others within her firm for guidance, she can also call local bar association ethics lines, lawyers' assistance programs, or AILA's Practice and Professionalism Center.

[78] If Bob's "erratic" behavior is compromising ethical representation of the firm's clients, Sam may have a duty under MR 8.3(a) to report Bob to the appropriate professional authority in his jurisdiction.
[79] MR 5.2(a). If Sam were acting in accordance with a supervisor's "reasonable resolution of an arguable question of professional duty," then he would not be violating the rules. MR 5.2(b).
[80] Id.
[81] MR 1.1, Cmt. 2 (competent representation by new lawyer can be provided through association with a lawyer of established competence in the field in question).
[82] ABA FORMAL OP. 481 (2018).
[83] NORTH CAROLINA ETHICS OP. 2013-8 (2014) (a lawyer's partners and supervisors must tell the firm's clients if they believe the lawyer is impaired and can no longer represent clients competently); NEW YORK STATE ETHICS OP. 1092 (2016) (where lawyer learns client may have a malpractice claim against co-counsel lawyer must tell the client).

Hypothetical Six: Co-Client Communications

Alex is a Houston-based immigration lawyer in private practice. He takes a meeting with Bill, a U.S. citizen, along with Bill's new wife, Rosa, and Rosa's seven-year-old son, Manuel. Rosa and Manuel are both citizens of Mexico and speak no English. As Alex speaks no Spanish, Bill, who is bilingual, explains to Alex that he has known Rosa for about two years, having first met her during one of his many business trips to Mexico. Bill and Rosa kept in regular touch since that time and they were married in Houston just a few days ago, about three months after Rosa and Manuel travelled to the United States to spend a long vacation with Bill. Bill would like Alex to help Rosa and Manuel secure U.S. lawful permanent resident status. After Bill translates Alex's explanation of the immigration process to Rosa, both Bill and Rosa sign Alex's engagement agreement, which is written in English. In the following weeks, Alex gathers the appropriate documentation from the family, prepares the application packages, and submits them to USCIS.

Two months after the application packages are filed, Bill stops by Alex's office to drop off a payment check. When doing so, he tells Alex that he's happy to have just learned from his criminal defense lawyer that his arrest and conviction record have been expunged. Alex, who was never told of any criminal offense, asks Bill to explain. Bill then tells Alex that 15 years ago, as a result of a "huge misunderstanding," he was convicted of "abusing a minor," which required him for a time to register as a sex offender. Alex asks Bill if Rosa knows about the conviction. Bill says "Rosa knows I haven't always been a saint, but I'm not sure I ever got into the details about this thing with her. I probably did. This won't be a problem with her green card application, will it?"

What should Alex do?

Analysis

The first thing Alex should do is adjust his procedures for establishing a formal lawyer-client relationship. Through clearer communication up front, Alex could have avoided many of the problems he encounters later in this co-representation. Because there are inherent increased risks of a conflict of interest in co-representation, informed consent to the co-representation should have been obtained.[84] For example, Alex should have clearly communicated how criminal offenses could affect the case and inquired about criminal history; he should have clearly communicated the possible consequences of co-representation generally and in a case like this one specifically; he should have made sure that the retainer agreement indicated a clear understanding of, and informed consent to, the co-representation, including explicit permission to share confidential information. Each of these actions is necessary not only to ensure competent and diligent representation – especially with regard to gathering sufficient information to determine which applications are viable – but also, under Rule 1.4(b), to fully explain the options available so that Bill and Rosa can make informed decisions about the co-representation and about the potential effect of Bill's criminal history.

Alex also should ensure that an appropriately qualified interpreter is present to explain these and other issues accurately and completely to any client or prospective client. Though not explicitly mentioned in the Rules, many states require the use of a qualified interpreter if the lawyer cannot communicate with the client.[85] There is no indication here that Bill is a qualified interpreter. Even if he were, Alex's use of him essentially to speak for Rosa is problematic at best and most likely unethical.[86]

[84] *See* MR 1.7, Cmt. 31 ("The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent…"). *See also* MR 1.7, Cmts. 29-33 *generally*.
[85] *See supra* n. 26.
[86] *See supra* nn. 24-5.

Because Alex did not take any of these precautions or actions at the initial stages of the representation, he is in a very difficult situation now. As the Adam Walsh Act makes clear, a U.S. citizen or permanent resident who is convicted of certain offenses against minors is not eligible to petition for a relative unless a Department of Homeland Security adjudicator makes a discretionary determination, not subject to review, that the petitioner does not pose a risk to the petitioned relative.[87] This is a significant piece of information and under Rule 1.4(b), Alex has a duty to explain the information and its consequences fully to both Bill and Rosa so that they can make an informed decision about how to proceed. And if they do decide to proceed with the application, this would definitely require informed consent due to the conflict, which would have to be communicated to them under Rule 1.4(a)(1).

If Alex is also representing Manuel, the problems become even more complex. Now he is representing a client with diminished capacity and under Rule 1.14, may have to consider taking protective action if there is a reasonable belief that Manuel is at risk of substantial physical harm.[88] That action could include reporting to child protection agencies that could protect Manuel, asking for Manuel to be appointed a Guardian ad Litem, or informing Rosa about Bill's criminal history.[89] While these steps would be consistent with Alex's duties to Manuel and Rosa, none of them are consistent with his duties to Bill.

Given these intractable conflicts, the only ethical solution for Alex will be to stop representing both Bill and Rosa, and Manuel as well if the retainer includes Manuel as a client, with referrals to separate lawyers.[90]

Hypothetical Seven: Communicating a Lawyer's Error

Sarah is a busy solo practice attorney who practices in removal defense. Sarah has a heavy caseload, handling about 100 cases at a time. She is thrifty and likes to save on overhead expenses. She has one employee who acts as receptionist, paralegal, and bookkeeper.

Veronica hires Sarah to handle her removal case. Veronica has lived in the United States for 20 years. She is a single mother and has six United States citizen children – three of whom have severe genetic diseases that require specialized medical treatment only available in the United States. Veronica is also fearful to return to her home country of Mexico because of general country violence. Sarah informs Veronica that she could qualify for both asylum and cancellation of removal as a nonpermanent resident and promises to file both applications at the master calendar hearing, which is scheduled for 6 months later.

After Veronica hires her, Sarah gets very busy, not only with cases, but also with her own personal travel. Sarah knows she should devote more time to her cases, but thinks that she can manage since she has so much experience as a removal defense attorney.

At the time of Veronica's master calendar hearing, where the applications were due, Sarah submits the I-589 for asylum, but forgets about the EOIR-42B cancellation of removal filing. At the hearing, the Immigration Judge speaks very fast and Veronica does not understand what is going on, as her English is not good and Sarah waived an interpreter. Sarah also forgets to send Veronica a copy of the documents filed in court.

A week after the hearing, Veronica asks Sarah if she can have an appointment to discuss her case. Because she was confused, she wants to make sure that everything was okay at the master calendar hearing. Sarah

[87] INA §§204(a)(1), (b)(1).
[88] MR 1.14(b).
[89] Id. *See also* MR 1.14, Cmt. 5.
[90] MR 1.4, Cmt. 31 ("…continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.").

remembers that she forgot to file the EOIR-42B, so keeps moving the appointment with Veronica since she does not want to deal with an angry client.

Has Sarah violated Rule 1.4?

Analysis

By failing to inform Veronica of the filing error, Sarah is violating Rule 1.4. Sarah does not want to confront the fact that she made a serious mistake in the representation that, unless it can be corrected, could constitute ineffective assistance of counsel. Her failure to communicate with Veronica about the mistake, however, only compounds the ethical violation. Although a lawyer does not have to inform her client of every error or mistake, she must inform the client of any "material" error. An error is material if a disinterested lawyer would conclude that the error is *either* reasonably likely to harm or prejudice the client, *or* would reasonably make the client consider terminating the representation.[91] The cancellation application seems as if it is Veronica's most likely form of relief here and the failure to file that application meets both of the "material error" criteria. It is likely to harm Veronica because it significantly diminishes her chances for a successful removal defense, and it might very well make Veronica wish to find a different lawyer, especially given that she may wish to file an ethical complaint against Sarah and pursue a *Lozada* ineffective assistance of counsel claim.[92]

Rather than putting off informing Veronica of the unfortunate mistake and status of the case, Sarah should immediately move to rectify the mistake by filing a motion to permit late filing of the cancellation application. And she should set up a prompt meeting or call with Veronica both to inform her about the status of the case and the motion to permit late filing, and to advise Veronica of other options she may have, including seeking alternate counsel and the potential for a *Lozada* claim.

In addition, there is some question about whether Sarah's waiving the presence of an interpreter at the master calendar hearing is permissible. The practice is common, especially if waiting for an interpreter will cause a delay in having the case heard expeditiously. But proceeding in this manner is only ethically permissible if the client consents to the waiver and if the lawyer explains afterward what occurred at the hearing.[93]

Hypothetical Eight: Consulting on Client Objectives and the Means of Achieving Them

Attorney Martha is excited to get hired by Juventino. Juventino had been randomly arrested by an ICE Officer while in a Starbucks enjoying his latte. Juventino has a complicated removal defense case, but he also has a viable claim against the federal government for an unlawful arrest.

Martha assumes that Juventino is an uneducated man from Honduras who would not understand the "complicated issues" in his case. She tells her paralegal Maria that Juventino does not need copies of his legal documents because "he would not understand them." Martha desperately wants to be featured in the local paper as an immigration hero, so she pursues every aggressive legal avenue she can for Juventino, even possibly crossing some lines with respect to frivolous claims. She thinks that Juventino probably does not remember everything that occurred accurately and "embellishes" some of his claims.

Meanwhile, Juventino is getting annoyed at being treated like a five-year-old. He demands to meet with Martha to discuss his case and also to be provided copies of his documents. Martha tells her paralegal Maria that she simply does not have time to talk to Juventino and that Maria should discuss his case with him.

91 ABA Formal Op. 481 (2018).
92 *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1998).
93 MR 1.4(a)(1), (a)(3).

Has Martha violated Rule 1.4?

Analysis

Martha has violated numerous aspects of Rule 1.4. First, Martha has a duty under Rule 1.4 (a)(2) to discuss with her client the means of pursuing her client's objectives. While not every minor strategic decision must be discussed,[94] here Martha has decided to take actions that may be over-stepping ethical boundaries.[95] Such significant decisions on how to pursue a claim most certainly require consultation with the client.[96] In addition, while Martha's goal of achieving notoriety is not inherently unethical, it cannot be the basis for strategic decisions in the case unless the client is aware of this goal and agrees to it. Any plan that involves disclosure of confidential information, for example, explicitly requires Juventino's informed consent.[97] A plan that involves Martha obtaining media rights to Juventino's story is not even permissible until the representation has concluded.[98] And to the extent that Martha sees publicizing Juventino's story as a goal of the representation, the decision of whether to pursue that goal is entirely within Juventino's discretion.[99]

Martha has also violated Rule 1.4 by apparently not explaining Juventino's case to him so that he could make informed decisions about the matter. Even if Martha is correct that Juventino is "uneducated" (although it appears merely an assumption on her part), that does not eliminate, or even mitigate, her obligation to explain the matter to him. The burden is on Martha to maximize Juventino's understanding of the case, not to ignore her obligation because of any actual or perceived limitation on Juventino's part. In fact, even with clients where there ***is*** an actual limitation in their capacity to understand or otherwise participate in the representation, the lawyer still has an obligation to treat them as any other client to the extent possible, including with respect to communication.[100]

Finally, Martha has failed in her duty to respond to Juventino's reasonable requests for information. Rather than speak with Juventino herself, she has instead told her paralegal Maria to discuss the case with him. Although not referenced in the rule itself, jurisdictions that have ruled on the question of delegating communication responsibilities to a non-lawyer member of the firm have consistently found that it is a clear violation of Rule 1.4 and often Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance) as well.[101] Martha's best course of action would be a prompt meeting or phone call herself with Juventino to update him fully on his case.

Hypothetical Nine: Disclosing a "Corrected" istake

Santiago is an employee at REM, Inc. He is pursuing employment-based permanent residence after already using up most of his 5 years of allotted time in L-1B status. Fortunately, the Department of Labor has just

[94] *See* MR. 1.2, Cmt. 2 (lawyer typically has control over "technical, legal and tactical" matters).
[95] Unless she is making a good faith effort to challenge established law, filing a claim with no basis in law or fact will violate MR 3.1. And if she is submitting evidence she knows is false, she is violating MR 3.3.
[96] Although neither Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer) nor Rule 1.4 explicitly lists "testing ethical boundaries" as an item requiring client consultation, there are numerous provisions in these and other rules that highlight the importance of communicating ethical considerations to clients. E.g. MR 1.2, Cmt. 13 (requiring consultation with client on ethical limitations of lawyer's conduct; MR 1.4(a)(5)(same); MR 2.1 (lawyer may refer to moral considerations in advising client).
[97] MR 1.6(a).
[98] MR 1.8(d).
[99] MR 1.2(a).
[100] MR 1.14(a) ("When a client's capacity… is diminished… the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship"); MR 1.14, Cmt. 2 ("the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication").
[101] *See supra* n. 23.

approved REM's labor certification application for Santiago. Immigration lawyer Bob has worked with REM for many years and he is now doing what he can to help REM and Santiago complete the remaining steps in the application process as quickly as possible.

Bob has already prepared REM to file its I-140 immigrant petition and Santiago to file the concurrent I-485 application for adjustment of status, with an application for an employment authorization document (EAD). REM has told Bob that it needs Santiago to complete a critical project and Santiago needs regular income to keep his family in the U.S. Neither can afford any gaps in Santiago's work authorization.

Because the EAD is taking much longer than expected, REM agrees, upon Bob's recommendation, to file an L-1B extension for Santiago with evidence to recapture the 45 days he has been outside the U.S. during the last five years. With a timely filed L-1B extension, Santiago will be authorized to continue working for long enough to get the new EAD needed to stay employed while the I-485 application is pending.

Bob submits REM's L-1B extension for Santiago two weeks before his status expires. Two weeks and one day later, however, Bob gets the L-1B package back from USCIS with a rejection notice because one page is missing from the I-129 form. That same day, Bob files the late L-1B extension with the missing page of the I-129 form, the rejection notice, and his argument that USCIS, in the exercise of its discretion, should excuse the failure to file a timely extension in this case because he had submitted REM's petition for Santiago earlier on time, the missing page was his fault, and he re-filed it right away as soon as he received the rejection notice.[102]

Bob decides not to tell Santiago or REM about the mix-up because he believes that USCIS will accept the late filed L-1B extension under the circumstances. He is also embarrassed about his costly mistake and he believes that Santiago should not have to stop working because of such an inadvertent, innocent, and avoidable mistake.

Does Bob need to tell REM and Santiago that the L-1B petition was actually not timely filed? By not informing Santiago or REM about the rejection notice, or consulting with them about his response, has Bob violated Rule 1.4(a)? Does he need to tell Santiago to stop working because the extension was rejected and returned after the L-1B expiration date?

Analysis

Bob has an ethical duty to keep his clients, Santiago and REM, reasonably informed about the status of their case. Keeping a client reasonably informed includes informing them about any error that a disinterested lawyer would conclude is either reasonably likely to harm or prejudice the client, or would reasonably make the client consider terminating the representation.[103] Here, the fact that the I-129 form was filed with a missing page, an error that caused a late filing and potentially a rejection of the L-1B extension, could reasonably lead either Santiago or REM to consider terminating the representation and seeking a different lawyer. Given the length of Bob's relationship with REM, the fact that he moved quickly to correct the error and the real possibility that his error will be excused, it is quite likely that neither REM nor Santiago will want to terminate the relationship. Nevertheless, Bob is obligated to reveal and explain the error, its potential consequences, and the course of action he undertook. His failure to do so is a clear ethical violation.

In this case, Bob undertook to correct the filing error without first consulting with REM or Santiago. However, if the exigency of the situation required immediate action, Bob did not have to tell REM or Santiago beforehand, so

[102] 8 CFR §214.1(c)(4).
[103] ABA Formal Op. 481 (2018).

long as he promptly informs them of his actions afterward.[104] Correcting the error here is clearly consistent with REM and Santiago's goal of obtaining an L-1B extension and the immediate action taken by Bob was the best way to preserve that goal. Bob therefore did not need to consult with his clients before acting to correct the error.

Bob also must decide what to say to REM and Santiago regarding Santiago's continuing to work with no valid EAD and no valid L-1B extension. There are possible negative consequences to both REM and Santiago if Santiago works without proper authorization, including the discretionary denial of Santiago's I-485. Bob is therefore obligated under Rule 1.4(b) to explain fully to REM and Santiago these possible consequences so that they can make an informed decision about continuing the employment while no current authorization exists. Bob will need both to explain the consequences fully and refrain from counseling REM or Santiago to commit any fraudulent or criminal acts related to unauthorized employment.[105]

[104] MR 1.4, Cmt. 3 (exigency of situation may require lawyer to act without prior consultation with client).
[105] MR 1.2(d).

D. Summary of State Variations of Model Rule 1.4

Twenty-eight states have adopted MR 1.4 verbatim or have adopted minor linguistic variations that do not change the application of the rule.[106] Twenty-two states and the District of Columbia have made substantive modifications to MR 1.4, which are described in further detail below.[107]

States with Fewer Explicit Categories of Required Communication

Alabama

ot explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance

requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives; and (3) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[108]

Alaska

Alaska does not explicitly require that a lawyer: (1) reasonably consult with a client to discuss means of achieving objectives, and (2) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[109]

District of Columbia

D.C. does not explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives, and (3) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[110]

[106] California, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming.
[107] Alabama, Alaska, Arizona, Arkansas, District of Columbia, Hawaii, Idaho, Kansas, Louisiana, Maryland, Michigan, Mississippi, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, South Dakota, Texas, Virginia.
[108] Rule 1.4 (Alabama)

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
[109] Rule 1.4 (Alaska)
(a) A lawyer shall keep a client reasonably informed about the status of a matter undertaken on the client's behalf and promptly comply with reasonable requests for information. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(b) A lawyer shall promptly inform the client of any decision or circumstance that requires the client's informed consent, unless the client has already made an informed decision on the matter in previous discussions. Until the client has given the required informed consent, a lawyer shall refrain from taking binding action on the matter.
(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation. This paragraph does not apply to lawyers employed by the government as salaried employees or to lawyers employed as in-house counsel.
[110] Rule 1.4 (District of Columbia)

Kansas

Kansas rule does not explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives; and (3) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[111]

Maryland

Maryland does not explicitly require that a lawyer consult with a client to discuss means of achieving objectives.[112]

Mississippi

Mississippi does not explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives, and (3) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[113]

Missouri

Missouri does not explicitly require that a lawyer: (1) inform a client promptly of any decision or circumstance requiring informed consent; and (2) reasonably consult with the client to discuss means of achieving objectives.[114]

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer who receives an offer of settlement in a civil case or proffered plea bargain in a criminal case shall inform the client promptly of the substance of the communication.

[111] Rule 226:1.4 (Kansas)
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[112] Rule 19-301.4 (Maryland)
(a) An attorney shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 19-301.0 (f) (1.0), is required by these Rules;
(2) keep the client reasonably informed about the status of the matter;
(3) promptly comply with reasonable requests for information; and
(4) consult with the client about any relevant limitation on the attorney's conduct when the attorney knows that the client expects assistance not permitted by the Maryland Attorneys' Rules of Professional Conduct or other law.
(b) An attorney shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[113] Rule 1.4 (Mississippi)
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[114] Rule 4-1.4 (Missouri)
(a) A lawyer shall:

New Jersey

New Jersey does not explicitly require that a lawyer: (1) inform a client promptly of any decision or circumstance requiring informed consent; and (2) reasonably consult with the client to discuss means of achieving objectives.[115]

Oregon

Oregon does not explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives; and (3) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[116]

Texas

Texas does not explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives; and (3) consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[117]

Virginia

Virginia does not explicitly require that a lawyer: (1) promptly inform a client of any decision or circumstance requiring informed consent; (2) reasonably consult with a client to discuss means of achieving objectives; and (3)

(1) keep the client reasonably informed about the status of the matter;
(2) promptly comply with reasonable requests for information; and
(3) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[115] RPC 1.4 (New Jersey)
(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.
(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.
Note: Adopted July 12, 1984 to be effective September 10, 1984; new paragraphs (a) and (d) adopted and former paragraphs (a) and (b) redesignated as paragraphs (b) and (c) November 17, 2003 to be effective January 1, 2004.

[116] Rule 1.4 (Oregon)
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[117] Rule 1.03 (Texas)
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

consult with a client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.[118]

States with Additional Requirements: Communication of Lawyer's Malpractice Insurance

Alaska

Alaska requires a lawyer who is not employed by the government or as in-house counsel to inform a client about his/her malpractice insurance.[119]

New Mexico

New Mexico requires a lawyer to inform a client if s/he does not have a professional liability insurance policy with limits of at least $100,000 per claim and $300,000 in aggregate (including deductibles or self-insured retention). If the insurance policy lapses or terminates during the course of a representation, the lawyer shall provide notice to the client as prescribed by the rule. A record of disclosures made pursuant to this rule must be maintained for six (6) years after termination of representation of the client. A lawyer who knows or has reason to know that s/he cannot pay the required deductible or self-insured retention for these required insurance policies is in violation of this rule. Notably, this requirement does not apply to individuals who are full-time judges, in-house corporate counsel for a single corporate entity, or exclusive employees of a governmental agency.[120]

Ohio

Ohio requires a lawyer to inform the client if s/he does not have a professional liability insurance policy with limits of at least $100,000 per claim and $300,000 in aggregate, which must be maintained for five (5) years after

[118] Rule 1.4 (Virginia)
(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform the client of facts pertinent to the matter and of communications from another party that may significantly affect settlement or resolution of the matter.

[119] *See supra* n. 109.

[120] Rule 16-104 (New Mexico)
A. Status of matters. A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Paragraph E of Terminology of the Rules of Professional Conduct, is required by these rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
B. Client's informed decision-making. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
C. Disclosure of professional liability insurance.
(1) If, at the time of the client's formal engagement of a lawyer, the lawyer does not have a professional liability insurance policy with limits of at least one-hundred thousand dollars ($100,000) per claim and three-hundred thousand dollars ($300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule. If during the course of representation, an insurance policy in effect at the time of the client's engagement of the lawyer lapses or is terminated, the lawyer shall provide notice to the client using the form prescribed by this rule.
(2) The form of notice and acknowledgment required under this Paragraph shall be…

termination of the representation. If the required insurance policy lapses or terminates during a representation, the lawyer shall provide notice to the client as prescribed by the rule.[121]

South Dakota

South Dakota requires a lawyer to inform the client if s/he does not have a professional liability insurance policy with limits of at least $100,000 per claim or if such a policy terminates during the course of a representation. Such notice must appear on the lawyer's letterhead (and in every written communication with the client) and must read either:

(1) "This lawyer is not covered by professional liability insurance;" or
(2) "This firm is not covered by professional liability insurance."

This requirement does *not* apply to lawyers in full-time in-house counsel or government lawyers who do not practice outside of those capacities, or those who are members of classes indicated in § 16-18-20.2(1),(3),(4).[122]

[121] Rule 1.4 (Ohio)
(a) A lawyer shall do all of the following:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) comply as soon as practicable with reasonable requests for information from the client;
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.
(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.
(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.
(3) The notice required by division (c) of this rule shall not apply to either of the following:
(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;
(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel…

[122] 16-18-A: 1.4 (South Dakota)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) If a lawyer does not have professional liability insurance with limits of at least $100,000 or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:
(1) "This lawyer is not covered by professional liability insurance;" or
(2) "This firm is not covered by professional liability insurance."

Additional Requirement: Communication of Plea and/or Settlement Offers

Arizona

Arizona requires that a lawyer in a criminal case promptly inform a client of all proffered plea agreements.[123]

District of Columbia

D.C. requires that a lawyer in a criminal case promptly inform a client of all proffered plea agreements and that a lawyer in a civil case promptly communicate an offer of settlement.[124]

Hawaii

Hawaii requires that a lawyer in a criminal case promptly inform a client of all proffered plea agreements and that a lawyer in a civil case promptly communicate an offer of settlement.[125]

(d) The required disclosure in 1.4(c) shall be included in every written communication with a client.
(e) This disclosure requirement does not apply to lawyers who are members of the following classes: § 16-18-20.2(1),(3),(4) and full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment.

[123] ER 1.4 (Arizona)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in ER 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) In a criminal case, a lawyer shall promptly inform a client of all proffered plea agreements.

[124] *See supra* n. 110.

[125] Rule 1.4 (Hawaii)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's consent after consultation, as defined in Rule 1.0(c), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information;
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law; and
(6) promptly inform the client of a written offer of settlement in a civil controversy or a proffered plea bargain in a criminal case which the lawyer receives.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Michigan

Michigan requires that a lawyer in a criminal case promptly inform a client of all proffered plea agreements and that a lawyer in a civil case promptly communicate an offer of settlement.[126]

New York

New York requires that a lawyer promptly communicate with a client if required by court rule or law *or* if there are any material developments in the matter (including plea offers or settlement offers). [127]

Virginia

Virginia requires that a lawyer inform a client of relevant facts and communications from another party that may significantly affect settlement or resolution of the matter.[128]

Additional Requirement: Communication of Payments to Client

Arkansas

Arkansas requires a lawyer to notify a client in writing promptly about any actual or constructive payments for monies to which the client is entitled.[129]

[126] Rule 1.4 (Michigan)
(a) A lawyer shall keep a client reasonably informed about the status of a matter and comply promptly with reasonable requests for information. A lawyer shall notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[127] Rule 1.4 (New York)
(a) A lawyer shall:
(1) promptly inform the client of:
(i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules;
(ii) any information required by court rule or other law to be communicated to a client; and
(iii) material developments in the matter including settlement or plea offers.
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with a client's reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[128] *See supra* n. 118.

[129] Rule 1.4 (Arkansas)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules.
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

Additional Requirement: Communication of Account of Lawyer's Fees and Costs

Idaho

Idaho requires that a lawyer comply with reasonable requests for accounting as required by Rule 1.5(f).[130]

Additional Requirement: Communication of Terms of Lawyer's Financial Assistance to Client

Louisiana

Louisiana requires that a lawyer who provides any financial assistance to a client during representation inform the client in writing about the terms and conditions of the financial assistance (including the scope and limitations in Rule 1.8(e)) before providing it.[131]

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) A lawyer shall promptly notify a client in writing of the actual or constructive receipt by the attorney of a check or other payment received from an insurance company, an opposing party, or from any other source which constitutes the payment of a settlement, judgment, or other monies to which the client is entitled.

[130] Rule 1.4 (Idaho)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information, including a request for an accounting as required by Rule 1.5(f); and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[131] Rule 1.4 (Louisiana)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) The lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.
(c) A lawyer who provides any form of financial assistance to a client during the course of a representation shall, prior to providing such financial assistance, inform the client in writing of the terms and conditions under which such financial assistance is made, including but not limited to, repayment obligations, the imposition and rate of interest or other charges, and the scope and limitations imposed upon lawyers providing financial assistance as set forth in Rule 1.8(e).

Additional Requirement: Communication of Lawyer's Professional Biographical Information

Nevada

Nevada requires that a lawyer make biographical information about his or her background, training and experience available in writing following requests from the State Bar, a client, or a prospective client.[132]

[132] Rule 1.4 (Nevada)
(a) A lawyer shall:
(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these Rules;
(2) Reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) Keep the client reasonably informed about the status of the matter;
(4) Promptly comply with reasonable requests for information; and
(5) Consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) Lawyer's Biographical Data Form. Each lawyer or law firm shall have available in written form to be provided upon request of the State Bar or a client or prospective client a factual statement detailing the background, training and experience of each lawyer or law firm.
(1) The form shall be known as the "Lawyer's Biographical Data Form" and shall contain the following fields of information:
(i) Full name and business address of the lawyer.
(ii) Date and jurisdiction of initial admission to practice.
(iii) Date and jurisdiction of each subsequent admission to practice.
(iv) Name of law school and year of graduation.
(v) The areas of specialization in which the lawyer is entitled to hold himself or herself out as a specialist under the provisions of Rule 7.4.
(vi) Any and all disciplinary sanctions imposed by any jurisdiction and/or court, whether or not the lawyer is licensed to practice law in that jurisdiction and/or court. For purposes of this Rule, disciplinary sanctions include all private reprimands imposed after March 1, 2007, and any and all public discipline imposed, regardless of the date of the imposition.
(vii) If the lawyer is engaged in the private practice of law, whether the lawyer maintains professional liability insurance, and if the lawyer maintains a policy, the name and address of the carrier.
(2) Upon request, each lawyer or law firm shall provide the following additional information detailing the background, training and experience of each lawyer or law firm, including but not limited to:
(i) Names and dates of any legal articles or treatises published by the lawyer, and the name of the publication in which they were published.
(ii) A good faith estimate of the number of jury trials tried to a verdict by the lawyer to the present date, identifying the court or courts.
(iii) A good faith estimate of the number of court (bench) trials tried to a judgment by the lawyer to the present date, identifying the court or courts.
(iv) A good faith estimate of the number of administrative hearings tried to a conclusion by the lawyer, identifying the administrative agency or agencies.
(v) A good faith estimate of the number of appellate cases argued to a court of appeals or a supreme court, in which the lawyer was responsible for writing the brief or orally arguing the case, identifying the court or courts.
(vi) The professional activities of the lawyer consisting of teaching or lecturing.
(vii) The names of any volunteer or charitable organizations to which the lawyer belongs, which the lawyer desires to publish.
(viii) A description of bar activities such as elective or assigned committee positions in a recognized bar organization.
(3) A lawyer or law firm that advertises or promotes services by written communication not involving solicitation as prohibited by Rule 7.3 shall enclose with each such written communication the information described in paragraph (c)(1)(i) through (v) of this Rule.
(4) A copy of all information provided pursuant to this Rule shall be retained by the lawyer or law firm for a period of 3 years after last regular use of the information.

Additional Requirement: Communication of Nature of Lawyer-Client Relationship

Rhode Island

Rhode Island requires that a lawyer who has not regularly represented a client and has reason to believe that the client does not fully understand the nature of the attorney-client relationship take reasonable steps to inform the client of the nature of the attorney-client relationship before undertaking the representation.[133]

Additional Requirement: Mode and Frequency of Lawyer-Client Communication

New Jersey

New Jersey requires a lawyer to "fully inform a prospective client of how, when, and where the client may communicate with the lawyer."[134]

[133] Rule 1.4 (Rhode Island)
(a) A lawyer shall:
(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
(3) keep the client reasonably informed about the status of the matter;
(4) promptly comply with reasonable requests for information; and
(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.
(c) When a lawyer has not regularly represented a client and has reason to believe that the client does not fully understand the nature of the attorney-client relationship and the expectations and obligations arising out of that relationship, the lawyer shall take reasonable steps to inform the client of the nature of the attorney-client relationship before the representation is undertaken. Such disclosure should include what the lawyer expects of the client and what the client can expect from the lawyer. A lawyer may make such disclosure by providing the client with a copy of the statement of client's rights and responsibilities contained in Appendix 2 to these rules, or in any other manner sufficient to provide the client with a clear understanding of what services will be rendered by the lawyer and what the client's responsibilities are in order that the services can be performed effectively.

[134] *See supra* n. 115.

Chart of Variations by State

State Name	Variation(s)
Alabama	Alabama does not have provisions on requiring promptly informing a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.
Alaska	Alaska requires an attorney not employed by the government or as in-house counsel to inform a client about the attorney's malpractice insurance. Alaska also does not have specific provisions on reasonably consulting with the client to discuss means of achieving objectives and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.
Arkansas	Arkansas requires that an attorney promptly notify in writing regarding actual or constructive payment for monies to which the client is entitled.
Arizona	Alaska requires that an attorney in a criminal case promptly inform a client of all proffered plea agreements.
District of Columbia	D.C. does not have provisions on requiring promptly informing a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law. D.C. requires that an attorney in a criminal case promptly inform a client of all proffered plea agreements and that an attorney in a civil case to communicate an offer of settlement promptly.
Hawaii	Hawaii requires that an attorney in a criminal case promptly inform a client of all proffered plea agreements and that an attorney in a civil case to communicate an offer of settlement promptly.
Idaho	Idaho requires that an attorney comply with reasonable requests for accounting as required by Rule 1.5(f).

Kansas	Kansas does not have provisions on requiring promptly informing a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.
Louisiana	Louisiana requires that an attorney who provides any financial assistance to a client during representation inform the client in writing the terms and conditions of the financial assistance (including the scope and limitations in Rule 1.8(e)) before providing such assistance.
Maryland	Maryland does not have the provision on reasonably consulting with the client to discuss means of achieving objectives.
Michigan	Michigan requires that an attorney in a criminal case promptly inform a client of all proffered plea agreements and that an attorney in a civil case to communicate an offer of settlement promptly.
Mississippi	Mississippi does not have provisions requiring a lawyer to promptly inform a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.
Missouri	Missouri does not have provisions requiring a lawyer to inform promptly a client of any decision or circumstance requiring informed consent and to consult reasonably with the client to discuss means of achieving objectives.
Nevada	Nevada requires that an attorney make available, in written form, biographical information about his or her background, training and experience, upon request of the State Bar, a client, or a prospective client.
New Jersey	New Jersey does not have provisions requiring a lawyer to inform promptly a client of any decision or circumstance requiring informed consent and to consult reasonably with the client to discuss means of achieving objectives. New Jersey requires an attorney to "fully inform a prospective client of how, when, and where the client may communicate with the lawyer."

New Mexico	New Mexico requires that a lawyer must inform the client if s/he does not have a professional liability insurance policy with limits of at least $100,000 per claim and $300,000 in the aggregate. This does not apply to individuals who are a full-time judge, in-house corporate counsel for a single corporate entity, or an exclusive employee of a governmental agency. If during the course of the representation, the insurance policy lapses or terminates, the lawyer shall provide notice to the client. The rule also requires that a record of disclosures made pursuant to this rule be maintained for six (6) years after termination of representation of the client and that the minimum limits include deductibles or self-insured retention. Finally, a lawyer who knows or has reason to know that s/he cannot pay the deductible or self-insured retention is in violation of this rule.
New York	New York requires that an attorney promptly communicate with the client if required by court rule or law or if there are any material developments in the matter, including settlement or plea offers.
Ohio	Ohio requires that a lawyer must inform the client if s/he does not have a professional liability insurance policy with limits of at least $100,000 per claim and $300,000 in the aggregate. If during the course of the representation, the insurance policy lapses or terminates, the lawyer shall provide notice to the client. The notice must be maintained by the lawyer for five (5) years after termination of representation.
Oregon	Oregon does not have provisions requiring promptly informing a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.
Rhode Island	Rhode Island requires that an attorney who has not regularly represented a client and has reason to believe that the client does not fully understand the nature of the attorney-client relationship take reasonable steps to inform the client of the nature of the attorney-client relationship before the representation is undertaken.
South Dakota	South Dakota requires that a lawyer must inform the client if s/he does not have a professional liability insurance policy with limits of at least $100,000 per claim or if during the course of the representation, the insurance policy lapses or terminates, on letterhead using the following language in every written communication with the client. (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." This disclosure requirement does not apply to those in full-time in-house counsel or government lawyers who do not practice outside of those capacities, or those who are members of classes indicated in § 16-18-20.2(1),(3),(4).

Texas	Texas does not have provisions on requiring promptly informing a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law.
Virginia	Virginia does not have provisions on requiring promptly informing a client of any decision or circumstance requiring informed consent, reasonably consulting with the client to discuss means of achieving objectives, and consulting with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance against the Rules of Professional Conduct or other law. Virginia requires that an attorney inform the client of relevant facts and communications from another party that may significantly affect settlement or resolution of the matter.

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This chapter of the AILA Ethics Compendium is written by Theo Liebmann and reviewed and produced by the 2019-20 AILA National Ethics Committee (Craig Dobson, Chair and Michele Carney, Co-Vice Chair) and the AILA Practice & Professionalism Center.

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American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.5
Fees

Sherry K. Cohen, Reporter

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MODEL RULE 1.5 FEES

Most lawyers would advise potential clients to avoid entering into any significant business agreements without consulting a lawyer or otherwise making sure that they fully understand their rights and obligations. Yet every day, lawyers enter into agreements with their clients under those exact circumstances. The lawyer agrees to provide competent and diligent representation in exchange for a payment of the fee. For the most part, clients are not on an equal footing with the lawyer in the negotiation process, assuming there even is one. For this reason, lawyers have special ethical obligations concerning their fee arrangements, which concern the nature of the fees they charge and collect. Model Rule 1.5 sets forth those obligations as applied to all types of fee arrangements, including hourly billing, flat fees, contingency fees, divided fees or any combination, sometimes referred to as hybrid fee arrangements.

The overarching obligation, set forth in MR 1.5(a), is that the lawyer's fee or charges for expenses be reasonable or, put other ways, not unreasonable, excessive or unconscionable. Reasonableness is an objective standard based on many factors, eight of which are listed in the rule, to be considered on a case-by-case basis.

A further obligation, under MR 1.5(b), is that the lawyer must inform the client of the basic terms of the agreement to provide representation, in particular, the services the lawyer has agreed to perform (the "scope of the representation") and the amount of the fee and/or how it will be calculated (the "basis or rate of the fee"). Generally, the information must be communicated around the time the lawyer begins work on the matter ("before or within a reasonable time after"). The lawyer must also inform the client about any possible changes in the basis or rate of the fee during the course of the representation. Simply put, talking about the fee with the client or prospective client is not enough. There must be an agreement—a meeting of the minds—on what the lawyer is expected to do and what the client will have to pay. Under the rule, the agreement does not have to be in writing, even though having it in writing is "preferable." As will be discussed, many states do require that a fee or retainer agreement be in writing.[1]

Other special obligations, under MR 1.5(c), apply to contingency agreements, which the rule permits, except as set forth in MR 1.5(d), in criminal and domestic relations matters. Under MR 1.5(c), the contingency agreement must be in a writing signed by the client. The written agreement must include, consistent with the general communication requirement in MR 1.5(b), the basis for calculating the contingency fee, such as the percentage applied and particulars concerning payment of expenses incurred. The lawyer is also required to provide the client with a written accounting of the funds received and disbursed at the conclusion of the matter.

MR 1.5(e) addresses the special obligations on arrangements that concern the division of fees between two or more lawyers not in the same firm. In the first instance, under MR 1.5(e), lawyers may only divide fees on the basis of the work performed by the lawyers ("in proportion to the services performed by each lawyer") or if each lawyer has assumed shared ("joint") responsibility for the representation." The client must consent in writing, not only to the arrangement, but also to the actual share of fees to be received by each lawyer. Consistent with the primary obligation under MR 1.5(a), the total fee must be reasonable.

MR 1.5 may implicate other rules, concerning the safeguarding of client funds (MR 1.15(c)), returning of unearned fees (MR 1.16(d)), limiting the scope of representation (MR 1.2, and Comments 7 and 8), providing adequate communication (MR 1.4), and engaging in fair business transactions with clients (MR 1.8(a) and MR 1.8(h)). A lawyer's overall obligation never to engage in conduct involving dishonesty or misrepresentation may also be implicated in matters involving fees (MR 8.4).

Lawyers must also be mindful of applicable state or federal law concerning court approval of fees or statutory limitations on fees, as well as applicable state law concerning alternate fee dispute resolution or mandatory written fee agreements.[2] Immigration lawyers, in particular, must also comply with the EOIR rule that closely

[1] See, e.g., New York 22 NYCCR Part 1215 which requires written engagement letters or retainer agreements when fee exceeds $3000.
[2] See discussion of resolution of fee disputes at pp. 4-28.

mirrors MR 1.5(a) except that it prohibits the charging of a "grossly excessive" fee.[3]

Unlike some rules of professional responsibility, which for many lawyers may be implicated only occasionally, MR 1.5 comes into play every time a lawyer is engaged. The consequences of unresolved problems over fees may lead to loss of clients and civil litigation. They may also result in disciplinary investigations and possible sanctions for both individual lawyers as well as law firms.[4]

MR 1.5 sets the bar on the general subject of fees, but it does not on its face provide answers to many questions or problems that may arise. In order to address such questions, immigration lawyers, like others, must go beyond the language of the rule itself. For example:

- How are terms such as "advance" fees, "minimum" fees, "retainer" fees, "general or true retainers" and "non-refundable" fees defined?
- When a client agrees that a lawyer's fee is "non-refundable," does that make it so?
- How should a lawyer treat payment of advance fees? May the lawyer spend the money on the basis that such fees become his property upon payment?
- Since MR 1.5 only requires written fee agreements in contingency matters and in referrals, how should a lawyer determine whether to rely on oral agreements or written agreements in all other matters?
- If a solo criminal defense practitioner has a following in a community with a large population of foreign nationals, under what circumstances would the lawyer be able to collect a fee from an immigration lawyer to whom she refers cases?
- Under what circumstances, if any, could a lawyer's interest charges on unpaid balances be subject to the reasonableness standard under MR 1.5?
- Under what circumstances may a lawyer charge a client separately for expenses such as copying, postage, or long-distance phone calls? Out-sourced law-related services? Use of contract lawyers?
- Under what circumstances may a lawyer charge more than the actual cost of expenses? May a lawyer make a profit on charges for out-sourced legal services?
- Does MR 1.5 require a lawyer to include information in a fee agreement about alternate fee dispute resolution or billing practices?
- Is a lawyer required to keep a record of hours worked when charging a flat fee?
- Under what circumstances may a lawyer demand that his client pay more money in fees than originally agreed?

We begin by discussing the key terms used in MR 1.5, as well as other fee-related terms, followed by annotations and commentary on each sub-section of the rule, including citations to ethics opinions, disciplinary decisions and, where applicable in the text itself, state variations from MR 1.5. We will also address special concerns in the immigration context, namely: fee disputes, interaction between MR 1.5 and MR 1.16, interaction

[3] See 8 CFR § 1003.102 (a) which sets forth one of the grounds for disciplining an attorney, namely, charging or receiving:

"Any fee or compensation for specific services rendered for any person that shall be deemed to be grossly excessive. The factors to be considered in determining whether a fee or compensation is grossly excessive include the following: The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the attorney; the fee customarily charged in the locality for similar legal services; the amount involved and the results obtained; the time limitations imposed by the client or by the circumstances; the nature and length of the professional relationship with the client; and the experience, reputation, and ability of the attorney or attorneys performing the services."

[4] In states where the Rules of Professional Conduct apply to a law firm as an institution, a firm could also be subject to discipline in cases where the violation of a rule is a result of a firm's policy or a pattern of non-attention to the requirements. See 22 NYCCR §1240.1(e); see also New Jersey cases, In re Jacoby and Myers, 147 N.J. 374 (1997) (public reprimand of firm for failing to use approved New Jersey bank for trust account) and In re Ravich, et al., 155 N.J. 357 (1998) (public reprimand of firm for improper solicitation in mass tort action). In addition, under a state's version of MR 5.1, discipline may also be imposed on a partner or lawyer, with managerial or supervisory authority, for violations of an individual lawyer under their authority. For this reason, among others, law firms should always be sure to have systems in place to ensure compliance with the Rules of Professional conduct, in particular, rules relating to fees, such as MR 1.5, MR 1.15 and MR 1.16(d).

between MR 1.5 and MR 1.15(c), interaction between MR 1.5 (a) and MR 1.5(b) and MR 1.8(a). Lastly, we will present and discuss various immigration law hypotheticals involving the application of MR 1.5 and related rules.

To review the full text of MR 1.5 and the Comments, please visit the *Model Rules of Professional Conduct: Table of Contents* on the American Bar Association's website.

Prudent and conscientious lawyers should always carefully review the applicable state's rules of professional conduct and opinions, and in particular that state's version of any model rule cited in this EC.

A. Key Terms and Phrases

Defined Terminology under MR 1.0

Reasonable or Reasonably

The term "reasonable" is defined under MR 1.0(h) as applied to the conduct of a lawyer only, not expressly as to fees or expenses. Nevertheless, the explanation of the term "reasonable" as denoting "the conduct of a reasonably prudent and competent lawyer" is helpful in setting the standard to be applied in determining whether the manner in which a lawyer seeks to be compensated is consistent with the "reasonable lawyer test." The factors listed in MR 1.5 support the conclusion that it is objective standard.[5]

We discuss what constitutes a reasonable fee in more detail at pp.4-9.

Confirmed in Writing

The phrase "confirmed in writing" is used in MR 1.5(e) in discussing the circumstances under which two lawyers not in the same firm may ethically divide legal fees. Under sub-section (e), the client must confirm in writing her agreement "to the arrangement, including the share each lawyer will receive." As defined in MR 1.0(b), the term, which is linked to the concept of informed consent, means "informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent."

Writing or Written

The term "writing" is used in MR 1.5(b), (c), and (e) as it relates to a client's consent to fee agreements addressed in the rule. It is defined under MR 1.0(n) as including any "tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostatting, photography, audio or video recording, and electronic communications."

Terminology of Fee Agreements: Not Defined in Model Rules

Fee Calculation

There are several important components to fee agreements. One concerns how the total fee is to be calculated, such as hourly rate, a flat or fixed fee, a contingency percentage or a hybrid. Another component concerns how the fee is to be paid, such as (1) when the total fee is paid in advance, as in the case of a flat or fixed fee, (2) when only a portion of the total fee is paid in advance, such as when a client pays a deposit against services to be billed at the hourly rate or (3) when a client simply pays upon receipt of regular billings. Other components concern whether, as may be required under MR 1.16(d), fees paid in advance will be subject to a refund if the representation is terminated and whether the lawyer is required to safeguard fees paid in advance by placing those funds in a trust account under MR 1.15(c).

Hourly Rate

[5] Notably, the lawyer's good faith belief that a fee or expense is reasonable is not listed as factor. Further, state variations from MR 1.5 express the point that the standard is an objective one, i.e., that of the reasonable or prudent lawyer. See, e.g. Michigan Rule 1.5(a) which refers to the "definite and firm conviction" formed by "a lawyer of ordinary prudence" after a review of the facts that a fee is "clearly excessive" and New York Rule 1.5(a) which refers to the "definite and firm conviction" formed by "a reasonable lawyer" after a review of the facts that a fee is "excessive."

By definition, the total fees charged or collected by a lawyer based on an hourly rate consist of the simple calculation of the number of hours the lawyer worked multiplied by the hourly rate.[6] The downside of an hourly fee agreement for the client is that she cannot be sure what the ultimate fee will be, irrespective of any estimate given by the lawyer. The upside for the lawyer is the assurance that she will be compensated for the time put into the matter.

Flat Rate Fees

Under a flat (or fixed) rate fee arrangement, the lawyer sets a fixed sum of money for the services to be performed.[7] The flat fee arrangement involves an element of shared risk. By agreeing to charge a flat fee, the lawyer waives the right to seek further compensation if the fee paid is less than a fee based on an hourly rate and the client agrees to pay the fee even if it is more than a fee based on the hourly rate.[8] A fixed fee can provide a satisfactory compromise between the client who wants to know exactly how much he will have to pay and the lawyer who may prefer another type of fee but is willing to quote a flat fee to get the client's business. The entire flat fee may be paid in advance of the legal work to be performed or paid in stages in advance of a specific legal service to be performed, as in the case of immigration matters in which the scope of the work may change depending on the outcome of a particular service.[9]

Contingency

A contingency fee is compensation that is dependent solely on the successful outcome of the legal matter, usually calculated on a percentage of the amount of money recovered, or if the matter involves money saved, a percentage of that amount (sometimes called "reverse contingency.") As understood by most of the general public, if there is no recovery, the client pays no fee as the lawyer has assumed the risk of not being compensated. A form of a contingency fee is a fixed sum of money to be paid by the client in addition to an hourly or fixed fee, as a "bonus" or "success" fee.[10]

Hybrid

Hybrid fee arrangements, included in the category of "alternative fee arrangements" and as suggested by the word itself, may consist of some combination of other types of fee arrangements. Examples are: (1) a "blended hourly rate" in which one negotiated rate is applied to all hours billed on a matter, irrespective of whether it is for a partner, associate or paralegal, (2) a "fixed fee plus hourly rate" such as a fixed fee for the preparation of documentation, such as a brief or contract, and an hourly rate for client meetings or phone calls, or (3) an "hourly rate plus contingency" such as a reduced hourly rate in litigation with a lower percentage contingency or flat rate bonus if the matter is successful.[11] To the degree that a hybrid fee agreement includes a contingency fee component, lawyers should be sure to comply with the requirements set forth in MR 1.5(c). As in the case of

[6] If more than one lawyer in the same firm provides legal services, hourly rates may differ, and under MR 1.5(b) this may have to be communicated to the client.

[7] See Florida Rule 1.5(e)(2) defining a flat fee as "a sum of money paid to a lawyer for all legal services to be provided in the representation."

[8] See West Virginia Ethics Op. 98-01 (1998) (flat fee permissible if reasonable lawyer concludes fee is sufficient to allow competent representation and provides details of fee agreement to client).

[9] In the immigration context, it is quite common for a fee agreement to indicate an additional flat fee in the event there is additional work. For example, the lawyer may charge a fixed amount for preparing and filing an H-1B petition. If there is a Request for Evidence, the fee agreement may say that the lawyer may charge an additional flat fee, with the range provided, based on the complexity. An additional fee may also be charged in situations in which an H-1B petition is denied and the fee agreement contemplates charging additional reasonable flat fees, at an amount to be determined, in the event the client wishes to pursue administrative review.

[10] For an excellent overview of contingency arrangements, including a discussion of all applicable ethical rules, see ABA Formal Opinion 94-389 (1994).

[11] See Mark A. Robertson, "Marketing Alternative Fee Arrangements, Law Practice Magazine, Vol. 37, No. 5 (September/October 2011) at http://www.americanbar.org/publications/law_practice_magazine/2011/september_october/alternative_fee_arrangements.html; NYSBA Ethics Op. 697 (December 30, 1997) (lawyer may charge a modified contingency fee (e.g., a reduced hourly fee combined with reduced contingent fee as long as the total fee is reasonable.)

contingency agreements, lawyers must also be sure that such agreements comply with any applicable court rules regulating the percentage of recovery, among other things.

Timing

Advance Payment or Advance Fee

As noted in Comment 4 to MR 1.5 a "lawyer may require advance payment of a fee." The term "advance payment" or "advance fee" taken literally refers to the timing of the payment, obviously suggesting that it is paid "up front." An advance fee may be a payment of a deposit against costs (services performed at the hourly rate), payment of portion of or all of a flat fee for services to be performed in the future or, arguably, as we discuss below, fees paid at the inception of the representation characterized as "earned upon receipt" or even "non-refundable."[12] Payment of an advance fee provides the lawyer with some assurance that he will be paid for the work for which the fee is designated to apply. However, an advance fee may or may not be subject to a refund depending on whether such fees are deemed "earned".[13] The determination of whether a fee has been earned in cases of advance fee payments requires further analysis of the purpose of the fee arrangement.[14]

Paid as Billed on a Regular Basis

In this scenario, the client simply agrees to pay for the lawyer's services as they are performed and accounted for on a regular basis.

Denomination of Fee Agreements

Notably MR 1.5 only references contingency and division of fee arrangements and does not discuss characteristics of other types of fee agreements. Perhaps, that is because the primary focus of MR 1.5 is that the fee not be unreasonable irrespective of the terms used to describe the fee agreement or used in the fee agreement.[15] For example, many fee agreements are referred to as "retainer agreements" or incorporate a form of the term retainer in the agreement. Yet often terms like "retain" and "retainer" or "retainer agreement" can have different meanings resulting in confusion for lawyers, clients and even the courts. In a typical lawyer-client engagement, for example, a client may say he "retained" a lawyer; a lawyer may say he has a new client who signed his "retainer agreement" or a lawyer may ask for a "retainer fee."[16] We discuss below the basic categories of "retainer agreements" and other terms or phrases, not defined in the Model Rules, that are associated with fee agreements.

Classic or General Retainer Agreement

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[12] Fees "paid in advance" are expressly referred to in MR 1.15(c), which concerns safeguarding client property or funds. MR 1.15 (c) requires that lawyers must "deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." See pp 4-29 for a discussion of the interaction between MR 1.5 and MR 1.15 (c).

[13] Comment 4 to MR 1.5 notes that under MR 1.16(d) the lawyer would be required to return any unearned portion of the fee. See pp 4-30 for a discussion of the interaction between MR 1.5 and MR 1.16(d).

[14] See, e.g., Matter of Sharif, 459 Mass. 558, 564 (2011) ("where a client pays an attorney a sum of money for legal fees before the legal fees have been earned, the fees advanced, often referred to as a retainer, belong to the client until earned by the attorney and must be held as trust funds in a client trust account.").

[15] Indeed, only a minority of state versions of MR 1.5 include such definitions. See, e.g. Florida Rule 1.5(e) (2) (defining "Retainer," "Flat Fee" and "Advance Fee"); Washington Rule 1.5(f) (defining "retainer" and "flat fee" in context of MR 1.15 (handling of client funds).

[16] See Cluck v. Commission for Lawyer Discipline. 214 S.W.2d 3d 736 (2007) (noting the confusion from the use of the word "retainer", the court observed as follows:

> The word "retainer" has a variety of meanings, including a client's authorization for the attorney to act in a matter; a fee paid simply to have the attorney available when the client needs help, a lump-sum fee paid to engage the lawyer at the outset of the matter, and an advance payment for work to be performed in the future." (Black's Law dictionary 1341-1342 (8th Ed 2004) Indeed, over the years attorneys have used the term "retainer" in so many conflicting ways that it should be banished from the legal vocabulary…If some primordial urge drives you to use the term "retainer" as least explain what you mean in terms that both you and the client will understand.

A "classic retainer, "general retainer" or "true retainer" refers to an agreement between the lawyer and the client, in which the client agrees to pay a fixed sum to the lawyer in return for the lawyer's promise to be available to perform legal services that may arise during a specified time period. The lawyer commits himself to take on future legal work for the hiring client, regardless of inconvenience to other client relations or workload constraints.[17] The lawyer also gives up the right to be hired by others with interests that conflict with the general retainer client. The general retainer in effect ensures an exclusive relationship.[18] The general retainer agreement is not intended to compensate a lawyer for legal services to be performed in a particular matter in the future, which would be charged for separately. The classic retainer fee is often characterized as "earned" upon receipt. General retainers may be appropriate for corporate or business clients who want to ensure the availability of a certain lawyer or law firm to handle specific matters in the future, as well as availability for consultations on an ongoing and regular basis.

We discuss special and general retainer agreements in more detail at pp. 4-20.

Special Retainer Agreement

A "special retainer" (sometimes also referred to simply as "retainer" or a "case retainer") refers to an agreement between the lawyer and the client in which the client agrees to pay specified fees (based on hourly, flat or hybrid rate) in return for the lawyer's specified legal services. The fee may be paid in advance (sometimes referred to as a "retainer fee") or billed as the work is performed.[19] When the fee is paid in advance for fees calculated on an hourly rate, the payment is essentially a deposit to cover the cost of the lawyer's services up to the amount of the payment. Lawyers often use the term "retainer" colloquially when asking a client to make an advance payment before the lawyer performs the services e.g., a $3,000 "retainer" for work to be performed at a rate of $300 (ten hours of work) or a $3,000 flat fee "retainer" for work to be performed, irrespective of the amount of hours.

Other Terms Applied to Fee Agreements that Impact the Applicability of MR 1.16(d) (lawyer's obligation to refund unearned fees) and MR 1.15(c) (treatment of advance payments)

Nonrefundable Fee

Because MR 1.16(d) requires that a lawyer, upon termination of the representation, return any unearned fees, the use of the term "nonrefundable" to describe a fee would appear to be at odds with that rule.

In special retainer agreements, where the lawyer agrees to provide future services in connection with a specific matter, the lawyer's fees can only be earned upon performance of those services. If the lawyer has not performed those services at the time the representation is terminated, he would be obligated to return the unearned portion under MR 1.16(d). By contrast, in general retainer agreements, because the advance fee paid to the lawyer is to compensate him for his immediate commitment to provide representation to the client in the future and presumably the lawyer honors that commitment, the advance fee is generally "earned upon receipt"[20] and under

[17] Id.

[18] See Banning Ranch Conservancy v. Sup. Ct. (2011) 193 Cal. App. 4th 903, 916-917. ("Classic retainer agreements, in essence, are option agreements: in exchange for the payment of an engagement retainer fee, the attorneys commit themselves to take on future legal work, regardless of inconvenience, client relations or workload constraints. '[L]awyers make two present sacrifices at the time of signing a general retainer agreement: they reallocate their time so that they can stand ready to serve the general retainer client to the exclusion of other clients and they give up their right to be hired by persons with interests that conflict with the general retainer client, thus again foregoing potential income.'"); Utah State Bar Ethics Advisory Opinion No. 12-2 (December 13, 2012); see also Richmond, "Understanding Retainers and Flat Fees" (2009) 34 J. Legal Prof. 113, 125).

[19] See Brickman and Cunningham, Nonrefundable Retainers: A Response to Critics of the Absolute Ban (1995) (64 Cinn. L. Rev. 11, p.8) (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=10029443).

[20] See Brickman and Cunningham, "Nonrefundable Retainers Revisited," 72 N.C. L. Rev. 1, 25 (1993) ("Under general contract analysis, the general retainer fee is earned when paid because the payment is given in consideration for the lawyer's availability, not as compensation for other services; the attorney is entitled to the money even if no services are actually performed for the client and has no obligation to later refund the money.")

MR 1.16(d) the lawyer would not be obligated to refund the fee. For that reason only, the fee paid for a general retainer may properly be denominated as nonrefundable.

Minimum Fee

Also not defined in the Model Rules is the term "minimum" fee. A "minimum" fee has been used to describe a fee arrangement which provides the lawyer with some measure of security that he will be paid something—by advance payment of the amount requested—and the client with notice that the services to be performed by the lawyer will amount to no less than what is designated as the "minimum" fee.[21] As discussed in greater detail below, the generic use of the term "minimum" to describe a fee will not exempt it from the requirements under MR 1.16(d), nor the requirement under MR 1.5(a) that the fee may not be unreasonable.[22]

We discuss nonrefundable and minimum fee arrangements in greater detail at pp. 4-30.

Safeguarding Advance Payment of Client Fees

MR 1.15(c) provides that a lawyer "shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." Accordingly, in order to determine the lawyer's obligations under MR 1.15(c) it must be determined if the advance fee is earned upon receipt, (as would usually be the case in a general retainer) or to be earned (as in the case of a special retainer). When an advance fee is for services not yet rendered, the fees have not been earned and the funds are deemed the client's property. Under MR 1.15(c), the paid fee must be safeguarded in the same way as all client or third party funds, to be withdrawn only when the lawyer has "earned" the fee or when the client or third party is entitled to the funds. When the advance fee is for services rendered by the lawyer immediately upon engagement, as in the case of a general retainer, they are deemed earned, are no longer deemed client funds and need not be held in trust.

We discuss the interaction between MR 1.5 and MR 1.15(c) in greater detail at pp. 4-29.

C. Annotations and Commentary

MR 1.5(a): Reasonableness of Fee

MR 1.5(a) has two prongs. The first expressly prohibits a lawyer from charging or collecting "an unreasonable fee or an unreasonable amount of expenses." The second prong lists factors to be considered in determining the reasonableness of the fee.

The first prong of MR 1.5(a) flatly prohibits a lawyer from charging or collecting "unreasonable" fees or expenses.[23] This applies generally to the ultimate fee charged or collected, although a lawyer's hourly rate may be a factor in determining if a fee is unreasonable. A highly experienced partner in a large firm may charge significantly more per hour than an inexperienced associate, but that alone would not support the conclusion that the partner's fee charged was unreasonable. Presumably, a more experienced lawyer will be able to complete the task in less time than a lawyer who charges a lower hourly fee. Similarly, the agreed fee amount to be collected by the lawyer in a contingency matter may vary depending on the difficulty of the matter and likelihood of success.

The second prong of MR 1.5(a) lists factors, that are not meant to be exhaustive, "to be considered in determining the reasonableness of a fee." We list the factors below together with practical observations as to their application.

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[21] See, e.g., 22 NYCRR 1400.4 (pertaining to fees domestic relations matters, "minimum fee" arrangement is defined as providing "for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.")

[22] See Brickman and Cunningham, "Nonrefundable Retainers Revisited," 72 N.C. L. Rev. 1, 25 (1993) (a "minimum fee" that allows a lawyer to keep an advance payment whether or not the lawyer performs the contracted legal services is essentially a "non-refundable fee in disguise.")

[23] The ABA amended MR 1.5 in 2002. The former rule which required that fees be "reasonable" was changed to prohibit fees that are "unreasonable" and to apply the same prohibition to expenses charged to the client. See ABA, "A Legislative History: The Development of the Model Rules of Professional Conduct," 1982-2005, at 91 (2006) (rephrasing not intended as substantive change.)

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

While time generally would refer to the hours worked, the other factors concern the nature of the services themselves. For example, if the lawyer is working under a short deadline, she may have to work more intensely. With a novel or more difficult matter, the lawyer may be justified in billing at a higher rate and a higher level of skill may justify a higher flat fee. With a routine matter, the lawyer may have difficulty in justifying a higher fee.[24]

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

This factor concerns what is often referred to as a "lost opportunity" cost, much like that which would be considered, as discussed above, in general retainer agreements.

(3) the fee customarily charged in the locality for similar legal services;

Here again the focus is on the fee charged, not the hourly rate and would generally reflect the overall economic environment of a particular locality. Although it may be common for lawyers to consider the "going rate" in their respective communities, lawyers must be careful not to set fee schedules collectively as such conduct may be subject to anti-trust laws.[25]

(4) the amount involved and the results obtained;

This factor is basically a cost-benefit analysis. For example, a fee may be deemed unreasonable if the amount of the fee exceeds the amount of recovery. It would also apply in situations in which it may be difficult to place an economic value on the result obtained, such as in child custody matters, rights to a cherished family heirloom or a scenario in which the underlying issue is a matter of principle. As discussed more fully at pp. 4-20, where a lawyer includes a "results obtained" component in a fee agreement, it may be deemed a contingency fee agreement subject to the requirements of MR 1.5(c).

(5) the time limitations imposed by the client or by the circumstances;

As discussed above, when a lawyer has a shorter amount of time to complete a task, as in the case of filing a complaint prior to the expiration of a statute of limitation or submitting an immigration application by a certain date on short notice, the nature of the work may be more challenging.

(6) the nature and length of the professional relationship with the client;

What the lawyer knows about the client from past experiences may influence the ultimate fee, as where a lawyer may charge a higher fixed fee because she knows the client may be difficult and require more time and labor than one who is more cooperative and less demanding. Conversely, a lawyer may charge a lower fee to entice prospective clients or to show appreciation for long-time clients.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

This factor is based on the premise that taken together experience, reputation and ability of the lawyer will usually influence the lawyer's fee.

(8) whether the fee is fixed or contingent.

This factor is based on the balancing of risk. For the lawyer, the degree of risk that she may not receive any compensation for work done on a contingency basis should have a correlation to the contingency fee percentage applied. In cases where the fee is fixed, even if the lawyer performs more work than contemplated, risk of

[24] In re Cendant Corp, 243 F.3d 722 (3d. Cir. 2001) (court invalided fee award that amounted to 5.7% of $341 million settlement on basis defendant conceded liability and action settled quickly with little motion practice or discovery).

[25] Goldfarb v. Va. Bar Assoc., 421 U.S. 772 (1975) (antitrust law applies to county bar association fee schedule enforced by state bar)

receiving no compensation is eliminated completely.

State Variations for MR 1.5(a)

Not all states have adopted MR 1.5 verbatim. With respect to sub-section (a), some states use different terms to describe what is essentially an "unreasonable" fee as used in MR 1.5, such as the words "excessive" or "unconscionable." The variations are as follows:

What is an Unreasonable Fee?	
States	**Description of Term**
Alabama	"not clearly excessive"
California	"illegal or unconscionable"
Florida	"illegal, prohibited or clearly excessive"
Kansas	"shall be reasonable"
Massachusetts	Not "illegal or excessive"
Michigan	Not "illegal or clearly excessive"
Mississippi	"shall be reasonable"
New Hampshire	Adds "illegal"
New York	Not "excessive or illegal"
North Carolina	"illegal or excessive"
Pennsylvania	Not "illegal or clearly excessive"
Texas	Not an "illegal fee or conscionable fee"
Utah	"illegal or clearly excessive"
Virginia	"shall be reasonable"
Washington, D.C.	"shall be reasonable"

Some state versions of MR 1.5(a) differ slightly with respect to the reasonableness factors, but we do not cite the differences here, given that the Comments make clear the list is not meant to be exclusive in any event. *Lawyers should check their applicable state version of MR 1.5 as well as the Comments.*

Reasonable Fees

As noted, the factors which support the overarching requirement of MR 1.5, that a lawyer's fee must be reasonable, are not exclusive,[26] and the standard may apply at the initial stage of the representation ("charge") as well as at the point at which the fee that is actually paid ("collect"). A lawyer's hourly rate or flat fee, for example, may appear reasonable at the inception of the representation, but not so at the conclusion.[27]

[26] Comment 1 to MR 1.5; ABA Formal Ethics OP. 329 (1972) (rule "enumerates certain factors to be considered in fixing fees, [it] does not prescribe the manner in which those factors are to be applied, and therefore at least by implication does not proscribe any reasonable method of fixing fees which takes them into account").

[27] See, e.g., In re Connelly, Ariz., No. SB-02-0055-D (Aug. 9, 2002) (in determining whether a fixed flat fee is reasonable, court may engage in "retrospective analysis."); See in the Matter of Swartz, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984) ("if at the conclusion of a lawyer's services it appears that a fee, which seemed reasonable when agreed upon, has become excessive, the attorney may not stand upon

Other factors specific to the particular case may also be considered.[28] Courts or other authorities may consider in the case of an estate matter, the size of the estate[29] or in a domestic relations case, the parties' relative financial status and good or bad faith conduct.[30] A client's consent to fees charged will not shield a lawyer from a finding that a fee is unreasonable.[31] Conversely, a lawyer or firm that charges a fee that appears unreasonable on its face, may be able to justify the reasonableness of the fee on the basis that a wealthy and sophisticated client knowingly supported the "extravagant litigation" in which the law firm engaged.[32]

The list of factors provided in MR 1.5(a) presupposes that the lawyer is billing the client for services rendered on behalf of the client, not services that only benefit the lawyer. For that reason, a charge to the client for time spent responding to the client's ethics complaint would be deemed unreasonable, as would a charge for time spent resolving a fee dispute with the client.[33] As reflected in Comment 5, lawyers who bill hourly should avoid using wasteful procedures that exploit the fee arrangement.[34]

Fraudulent Billing

Fraudulent billing by definition would violate MR 1.5(a)'s prohibition against unreasonable fees. Fraudulent billing practices also would always constitute a violation of MR 8.4(c) since it involves intentional dishonesty or misrepresentation, and depending on the circumstances may also constitute a crime. More commonly, what is described as intentional bill-padding (billing for unnecessary work or hours not worked)[35] or double billing (billing the same work to more than one client, or one client's work to another) would always be deemed an unreasonable fee. Other examples would include intentionally charging or collecting a fee which exceeds a

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the contract; he must reduce the fee."); Matter of Powell, No. 49800-0910-D1-426(Sup. Ct. Ind. Sept 29 2011) ("even if fee agreement is reasonable under the circumstances at the time entered into, subsequent developments may render collection of the fee unreasonable").

[28] See e.g., Gomez v. Gates, 804 F. Supp. 69 (C.D. Cal. 1992) (representation of unpopular clients justified upward adjustment of fee award in federal civil rights action).

[29] See In Re Estate of Johnson, 119 P.3d 425 (Alaska 2005).

[30] See Mani v. Mani, 869 A.2d 904(N.J.2005).

[31] See In Re Egger, 98 P.2d 477 (Wash. 2004)(where elderly client consented to lawyer's double payment for legal work, fee still deemed unreasonable); In re Sinott, 845 A.2d 373 (Vt. 2004)(in debt resolution matter, firm's monthly "administrative fees" deemed unreasonable because they were not calculated on the basis of any legal work performed and thus fee unreasonable irrespective of factors listed in Rule 1.5(a); court reasoned that "lawyers, unlike some other service professionals, cannot charge unreasonable fees even if they are able to find clients who will pay whatever a lawyer's contract demands").

[32] See Paul Weiss Rifkind Wharton Garrison v. Koons, 780 N.Y.S.2d 710 (Sup. Ct. NY County 2004) ($3.9 million fee in domestic relations matter between wealthy artist husband and famous wife where artist instructed law firm to leave no stone unturned, not unreasonable); see also See Matter of Lawrence, NY Slip Op 07291 (NY Court of Appeals October 28, 2014) (upholding reasonableness of $40 million contingency fee where plaintiff knowledgeable, consulted with independent counsel and no evidence that law firm engaged in any deception).

[33] In re Napolitano, 662 N.Y.S.2d 56 (App. Div.1997) (charging for time spent answering disciplinary complaint amount to attempt to collect an excessive fee); N.C. Ethics Op. 2000-7 (2000) (lawyer may not charge client legal fee for time required to participate in state bar's fee dispute resolution program).

[34] See Comment 5 to MR 1.5.

[35] In re Nizer, 93 A.D.3d 1141 (N.Y. App. Div. 3d Dept. 2012) (associate engaged in fraudulent billing by preparing false time sheets to employer and providing bills "to clients representing that he had performed work for those clients when in fact no work was performed by him"); In re Glesner, No. 99-3351-D, 606 N.W.2d 173 (Wis. Sup. Ct. 2000) (lawyer attempted to regain fees lost when client challenged previous bill by submitting inflated charges in next bill) (People v. Espinoza, 35 P.3d 552 (Colo. O.P.D.J. 2001) (lawyer inflated billing entrees and charged for time not spent); In re Van Camp, 171 Wn. 2d 781 (Sup. Ct. 2011) (lawyer improperly directed paralegal to increase calculation for lawyer time by, among other things, computing the bill as if the lawyer had spent a half-hour reviewing every document received or sent out); Yarboro Sallee v. Tennessee Board of Professional Responsibility, No. E2014-01062-SC-R3-BP (Sup. Ct. Tenn. July 23, 2015) (lawyer's billing for research which consisted of time spent watching television crime shows, including a documentary on a famous criminal case and other evidence of "wheel spinning" justified finding that fees charged were not reasonable under Rule 1.5).

statuary cap,[36] charging interest on fees before charges are billed or due,[37] or billing at a lawyer's hourly rate for work done by non-lawyers.[38]

An immigration lawyer was found to have engaged in fraudulent billing in violation of MR 8.4(c) by submitting false billing records to disciplinary authorities in response to a client's complaint. Among spurious time charges, many were for time spent by support staff leaving voicemail messages billed at the lawyer's hourly rate.[39] Another immigration lawyer was found to have charged an unreasonable fee that violated Rule 1.5(a) and Rule 8.4(c) when he billed for work he did not complete. In particular, the lawyer claimed his billing records show that he "more than earned" his fee, but he produced no records to show that he researched and drafted documents as he claimed.[40]

Inadvertent Overcharging or Sloppy Billing Practices

A lawyer's fees may be deemed unreasonable even if there is no finding of intentional misrepresentation. In one civil case, in which a large law firm submitted a fee application for over three million dollars based on over 500 billable hours, the court denied the application, observing, "It is highly unlikely that anyone at the [firm] actually reviewed the time records before hitting the print button."[41] Overstaffing or duplication of work, sometimes referred to as "over-lawyering," or even lax case management may also result in a finding that a fee is unreasonable.[42]

The civil consequences of charging substantial fees without sufficient proof of the work performed may be onerous. For example, where a fee in a civil rights suit was deemed outrageously excessive as a result of inflated billing rates, vague and generic descriptions of time entries and billing for previously awarded fees, a law firm's fee application was denied completely. Although there was no finding of intentional misrepresentation, the court denied the fee application on the basis that it had been prepared in bad faith.[43]

Failure to Perform Services or Value of Services Provided

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[36] In re Stephens, 851 N.E.2d 1256 (Ind. 2006); In re Shalant, 4 Cal. State Bar Ct. Rptr. 829(2006 disbarment)(lawyer charged illegal fee by coercing client to pay $25000 "surcharge" over state imposed maximum contingency fee}; In re Silverton, 36 Cal.4th 81(Cal. Sup. Ct. 2005) (lawyer charged "unconscionable" fee by getting client to agree to pay lawyer 100% of savings he negotiated with her health care providers in addition to the 33% of the recovery).

[37] Iowa Supreme Court Bd. Of Prof's Ethics v. McKittrick, 683 N.W.2d 554 (Iowa 2004) (lawyer who waited two years after representation concluded to collect unpaid bill, but charged compounded interest to which the client had never agreed, violated code rule against charging or collecting an "illegal" fee).

[38] See In re Green , 11 P.3d 1078(Colo. 2000)(billing tasks such as faxing or copying documents, calls to court clerk's office or delivering documents at the lawyer's hourly rate is unreasonable since they do not require a lawyer's skill and knowledge); In re Compton, 744 N.W.2d 78 (Wis. 2008)(paralegal's work billed at lawyer's hourly rate deemed unreasonable fee); Eureste v. Comm'n for Lawyer Discipline, Tex. Ct. App. 14th District, No. 14-01-00311-CV (April 18, 2002)(workers compensation lawyer improperly charged unconscionable fees and engaged in dishonesty, among other violations, for billing at lawyer's hourly rate for all time spent by non-lawyers in order accrue time charges that would reach the statutory maximum allowed).

[39] See People v. John Elliot Reardon, 13 PDJ 91 (Colorado June 9, 2014) (immigration lawyer who did not return unearned fee paid in advance found to have charged unreasonable fee in violation of Rule 1.5(a), improperly deposited unearned fee in operating account in violation of Rules 1.15(a) and Rule 1.15(c), failed to return unearned fee in violation of Rule 1.16(d) and engaged in dishonest conduct by submitting false bills in violation of Rule 8.4(c)).

[40] See People v Walker 05 PDJ 039 (December 27, 2005).

[41] See Campbell v. Mark Hotel Sponsor, LLC. Civ 09- 9644 (S.D.N.Y Sept. 13, 2012)(in real estate matter involving entitlement to a 4.7 million dollar down payment, court denied condo sponsor's application for attorney's fees of over $3.3 million stating that 5500 hours was an unreasonable amount of time to spend on the matter, factual and legal issues were not novel or complex, legal arguments remained the same throughout, much of discovery was redundant); See also Comment 5 to MR 1.5 which cautions lawyers to avoid the exploitation of hourly fee arrangements by "using wasteful" procedures.

[42] Carr v. Fort Morgan School District, 4 F. Supp 2d 998 (D. Colo. 1998) (fee deemed unreasonable where client billed for unnecessary discussions and review of work by multiple lawyers who charged high hourly fees; court reasoned that lawyers who charge high rates should not require so much collaboration).

[43] Tousle v. County of Suffolk, 806 F. Sup 2d 558-(S.D.N.Y. Sept 6, 2012) (court denied $2,800,000 fee request, and awarded a mere $12,500).

Lawyers who charge reasonable advance fees may be found to have charged unreasonable fees if they fail to perform the services for which they are retained and refuse to return the fee upon discharge.[44] Charging a substantial flat fee for a matter that in fact involves only a small amount of work, such as writing a simple demand letter, may amount to charging an unreasonable fee.[45] In other circumstances, a flat fee may be deemed reasonable even where the legal services performed do not require significant amount of time, such as when an experienced criminal lawyer with an excellent trial record is able to persuade a prosecutor to discontinue an investigation before any indictment. In such circumstances, consideration of the value to the client of the work performed (i.e., "the amount involved and the results obtained") would be a significant factor. Depending on the stakes, a criminal defendant might be very happy to pay a fee that covered the cost of a trial if the case is dismissed as a result of the work performed by the lawyer.

A lawyer's competence and diligence in handling a legal matter—in other words, the quality of the lawyer's work—may affect the determination as to whether the lawyer's fee was reasonable. Lawyers may be found to have charged unreasonable fees for billing the client for the time needed to achieve the required level of competence for a particular matter. When a lawyer agrees to accept a matter in which she is not competent the "cost" of becoming competent should not be passed along to the client.[46] Similarly, when a lawyer's work reflects a lack of competence–as in the case of failing to submit properly prepared documents in support of an application, the lawyer's failure to return the fee or re-do the work properly without additional charges may render the fee unreasonable.[47]

Reasonable Expenses

Generally, expenses are deemed reasonable if the amount reflects the case-specific costs incurred by the lawyer. A lawyer may seek reimbursement of what may be called in-house expenses such as the actual costs of copying, internet research time or fees paid to an investigator or an expert witness, but those fees must be reasonable as well.[48] Whether a lawyer charges separately for certain types of expenses, such as the costs for internet research separate and apart from the lawyer's time, will depend on the terms of the engagement agreement, including whether the fee will be based on an hourly rate or a flat fee basis.

Lawyers may not, however, separately bill clients for *general* office overhead such as maintaining a library, obtaining malpractice insurance, rental charges for office space or payments for utilities.[49] There may be instances in which a lawyer arguably could seek reimbursement of certain fees which are related to general overhead expenses, such as additional costs imposed by case management services when opening a web based

[44] In Re McKenzie 708 N.W.2d 310 (N.D. 2006) (lawyer who failed to commence civil rights action and refund $2500 advance fee charged unreasonable fee); In re O'Brien, 29 P.3d 1044 (N.M. 2001) ("any fee is excessive when absolutely no services are provided"); Att. Grievance Comma v. Guide, 891 A2d. 1085 (Md. 2006) ($750, an otherwise reasonable fee, for adoption proceeding deemed unreasonable when lawyer did not perform services).

[45] See In re Calahan, 930 So. 2d 916 (La. 2006) ($12,500 fee for writing one-page letter to client's former counsel demanding return of alleged excessive fee deemed unreasonable); Commonwealth v. Ennis, 808 N.E.2d 783 (Mass.2004) (defense counsel fees based on 64 hours to file short response to interlocutory appeal in criminal matter which offered no new arguments deemed unreasonable).

[46] Attorney Grievance Common v. Manger, 913 A.2d 1 (Md. 2006)(general education or background research should not be charged to the client); In re Disciplinary Action against Hellerud, 714 N.W, 2d 38(N.D. 2006)(lawyer unfamiliar with North Dakota probate work charged too many hours at too high a rate for simple administration of uncomplicated estate); Heavener v. Meyers, 158 F. Supp. 2d 278 (E.D. Okla. 2011)(billing for 500 hours for standard excessive-force claim and 19 hours for research on 11th amendment issues deemed excessive when time allegedly spent was found to be due to counsel's inexperience).

[47] See, e.g., People v. Woodford, 81 P3d 370 (Colo. O.P.D.J 2003) (when work incompetently performed client has not received value for the fee paid).

[48] Comment 1 to MR 1.5; ABA Formal Ethics Op, 93-379 (1993)(reasonableness standard under MR 1.5(a) applicable to charges for costs and expenses, which would not include overhead); San Diego County Bar Ethics Op. 2103-3 (July 16, 2013)(generally, lawyer may bill only actual cost of in-house services directly related to the representation, e.g., photocopying, electronic research, parking, meals, postage, plus a reasonable allocation of overhead expenses directly associated with providing the in-house services.)

[49] Disciplinary Board v. Matson (869 N.W.2d 128 (N. Dak Sup. Ct. 2015) (lawyer charged unreasonable fee for legal services, where, among other things, the lawyer billed for overhead expenses).

portal for the client which permits the client to track the status of her case. There, payment of the cost of the service by the client would be justified since the service is put in place primarily to benefit the client. Using the same rational, time spent completing time sheets or time spent on other administrative tasks would be deemed overhead expenses not chargeable to the client as an expense.[50]

Fees paid to contract lawyers or for outsourced legal work may be billed as an expense as long as the client's lawyer does not charge more than the actual cost plus any allocation for overhead, such as the contract lawyer's use of office space, support staff used or supplies provided to the contract lawyer.[51] A contract lawyer's services may also be billed as legal services rather than costs when there is evidence that the client's lawyer trained, supervised or monitored them.[52] The client's lawyer, however, must disclose the rate at which the contract lawyer's services will be billed and the contract lawyer's fee must, of course, also be reasonable.[53]

Lawyers are not permitted to use charges for expenses as a source of profit.[54]

State Variations in which Rule 1.5(a) does not expressly apply to expenses

States that Use the Term "Costs"	Alabama, California (rule 4-200), Florida, Washington, D.C.
"Expense" Term Subject to the Standard of Reasonableness, Notwithstanding[55]	Kansas, Michigan, Mississippi, New Jersey, Texas and Virginia

MR 1.5(b): Adequate Communication

MR 1.5(b) requires the lawyer to adequately communicate with the client about the fees for the representation.

When determining how much information must be communicated to the client under MR 1.5(b), lawyers should keep in mind that although MR 1.5(b) does not require the client's "informed consent" to the terms of a fee agreement (as defined under MR 1.0(e)),[56] the responsibility for providing the client with sufficient information about the fee agreement falls squarely on the lawyer. This responsibility goes hand in hand with the requirement under MR 1.4(b) that a lawyer must explain matters adequately in order for the client to make "informed decisions."[57] The conscientious and diligent lawyer should consider erring on the side of caution by providing as much information as needed to accurately reflect the work to be performed and the fees to be charged.

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[50] Attorney Grievance Common v. Kraemer, 946 A.2d 500 (Md. 2008) (lawyer improperly charged client for such things as "file organization, time sheet maintenance, reimbursement of fees and review and revise accounting [to be provided to client]…matters of overhead in any law office").

[51] ABA Formal Ethics Op. 00-420 (2000); ABA Formal Opinion 08-451 (August 5, 2008).

[52] Id. The client's lawyer may be permitted to a mark-up on the cost of the contract lawyer's services as long as it is reasonable.

[53] Haw. Ethics Op. 47 (2004); L.A. Ethics Op. 518 (2006).

[54] ABA Formal Ethics Op. 93-379, supra.

[55] Notably, Wash. D.C. Rule 1.5(b) requires that the lawyer communicate to the client the expenses for which she will be responsible.

[56] MR 1.0(e) defines informed consent as the "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

[57] MR 1.4(b) provides that a lawyer "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

MR 1.5(b) has three prongs:

First prong of 1.5(b)

The first prong requires that the lawyer communicate to the client, "preferably in writing" the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible."

Scope of Representation

MR 1.5(b)'s requirement that the lawyer communicate information about the scope of the representation and the basis for the fees makes sense. The phrase "scope of the representation" would include identifying the purpose of the representation, the particular legal matter to be handled and a description of the legal services that the lawyer agrees to undertake. Disclosing any limits on the scope of representation—e.g., the services that are not included—is particularly important not only in limiting fee disputes, but also in reducing the risk of disciplinary complaints stemming from alleged neglect or even civil malpractice claims.[58]

In the immigration context, an accurate description of the services to be rendered is particularly important. Immigration lawyers charging flat fees need to clarify what is covered since many immigration clients may not understand the nature and extent of the legal services to be performed or the possible next steps which may have to be taken beyond the original scope. For example, a lawyer's agreement to prepare a marriage-based application for adjustment to permanent residence would need to address whether the representation would include representation in removal proceedings if the application were denied. A legal services agreement which merely states that a lawyer is being hired to "obtain permanent resident status" does not effectively communicate the scope of the lawyer's representation. Will the client apply for adjustment of status or through consular processing? Will an application for a waiver of inadmissibility be required? Does the scope of representation include representation in removal proceedings, or only before a USCIS Field Office? If the agreement does not cover these points, misunderstandings between the client and lawyer are likely to follow.

Based on the above, immigration lawyers may want to consider offering limited representation or what has been described as unbundled services under MR 1.2(c). That rule provides that a lawyer "may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." The benefits include reducing the risk of future misunderstandings between the client and the lawyer regarding the scope of the services, and such agreements assist the lawyer in defending against possible ineffective assistance allegations.[59]

State Variations for Scope of Representation

While it is hard to imagine that a lawyer would fail to provide information about and reach agreement with her client as to the "scope of the representation," there are a number of states that do not expressly require that the lawyer do so.

[58] See e.g., Attorney Grievance Common of Md. V. Korotki, 569 A.2d 1224 (Md. 1990) (lawyer who failed to make clear that fee applied to only a trial "is not entitled to any compensation [for] appellate representation.").

[59] Immigrations lawyers should note that the EOIR has recently and formally acknowledged unbundled legal representation by issuance of a rule that allows a lawyer to represent a detained client only in the bond hearing as opposed to the removal hearing as well. See EOIR Memo at https://www.justice.gov/eoir/file/772051/download

States that only require lawyers to communicate with the client about the "basis or rate of the fee:"
Alabama
Kansas
Michigan
Mississippi
New Hampshire
New Jersey
North Dakota
Pennsylvania
Texas

Notably, lawyers practicing in states that do not include a "scope of representation" requirement could still run afoul of the requirement of adequate communication under MR 1.4—in particular, MR 1.4(a)(2) requiring "consultation with client about the means by which the client's objectives are to be accomplished" and MR 1.4(b) requiring an explanation of a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

Basis or Rate of Fee

The amount of detail necessary to explain the basis of the fee may vary. If the basis is an hourly rate, depending on the circumstances, a lawyer may be required to provide not only the billing rate of the lawyer who will be working on the case, but also the hourly rates of other lawyers or non-lawyers. Other types of fee arrangements may require communication in even more detail and must be presented in such a way as to eliminate misunderstanding. For example, where the fee is flat the lawyer must be sure to explain what the flat fee covers and what it does not cover.

The use of an ambiguous or otherwise undefined term in a fee agreement may violate this subsection as a Washington lawyer learned too late. The lawyer attempted to use an ambiguous flat fee agreement as justification for refusal to return an unearned fee.[60] The lawyer had used the term "earned retainer" in charging the client $25,000 to handle a settlement of a commercial matter, but never defined the term or explained that it could be interpreted as literally earned on receipt and non-refundable. Because the evidence showed that the lawyer had essentially neglected the matter and thus had not earned the fee, the lawyer was found to have violated Rule 1.5(b), among other rules, and ordered to pay $15,000 to the client in restitution.

There may be instances, in particular when a client has limited financial resources, that a lawyer may agree to represent the client even when it is not certain that the client will be able to pay for all the legal services required to complete the matter. For example, the lawyer may agree to provide up to 20 hours of legal services at a rate of $250 per hour up to a limit of $5,000. However, as Comment 5 cautions, when it is foreseeable that more extensive services are required to adequately represent the client, the lawyer should explain this to the client "upfront" so that the client and the lawyer may avoid a situation in which the client has to "bargain for further assistance" at a time when she is not in a position to engage other counsel or proceed pro se. Lawyers faced with such a scenario should also consider the circumstances under which a lawyer may withdraw from representation under MR 1.16(c).

[60] See In re Van Camp, 171 Wn. 2d 781 (Sup. Ct. Wn. 2011).

In the immigration context, a lawyer who agrees to represent an affirmative asylum client may become committed to continuing the representation through a petition for review with a federal circuit court of appeals, only to find that the client does not have the ability to pay the fees. In particular, the agreement should specify whether the lawyer is only being retained to represent the client in Immigration Court, or whether the agreement covers one or more levels of appellate review.

In addition, where there may be multiple forms of relief that could resolve a client's problem, the immigration lawyer's fee agreement should specify which forms of relief the lawyer will and will not pursue for the client. Someone in removal proceedings may be eligible for adjustment of status, asylum and cancellation of removal. If the lawyer is not willing and able to pursue all possible forms of relief, the fee agreement should make that clear.

Preferably in Writing

Surprisingly, MR 1.5(b) does not require that the fee agreement be in writing: the rule states only that a writing is "preferable." However, since the use of written fee/retainer agreements reduces the possibility of misunderstandings leading to fee disputes or a client unjustifiably refusing to pay a fee, best practice is to use written fee agreements after discussing the terms with the client.[61] The advantage of written retainer agreements was aptly underscored by the ABA Section of Business Law Task Force on Lawyer's Business Ethics, as follows:

> [It] is in the best interest of both lawyer and client for a written fee agreement to be in effect for all representations, whether or not required by local ethical or court rules or statute. By the very nature of the process of preparing a written fee agreement and discussing it with the client, the lawyer will be better able to determine if the client truly understands the implications of the fee arrangement.[62]

We discuss best practice in using written fee agreements in immigration matters at pp. 4-18.

State Variations for Preferably in Writing

Although MR 1.5(b) does not require that fee agreements be in writing signed by the client, a number of state versions of MR 1.5 do. They include:

States that Requires Fee Agreements be in Writing
Alaska: when fee is over $1000
Arizona
California: when fee is over $1000
Connecticut
Massachusetts: when fee is over $500, but not for consultations
Minnesota: writing is required for a "flat fee" or "general retainer" agreement ensuring lawyer's availability, subject to a refund if lawyer is not available as promised
Montana: when fee is over $500
New Mexico
New Jersey

[61] See Comment 2 to MR 1.5(b).

[62] See, e.g., ABA Section of Business Law Task Force on Lawyer's Business Ethics, Statement of Principles in Billing for Legal Services, 51 Bus. Law 1303 (1996).

Pennsylvania
Rhode Island
Washington State: only if client requests or if fee arrangement specifies that advance fee is lawyer's property
Washington, D.C.
West Virginia: if the fee is over $1000

Oregon requires a client's consent in writing to a fee denominated as "earned upon receipt" or "non-refundable" that also includes disclosure that funds will not be deposited in a trust account and that the client may be entitled to a refund if client discharges the lawyer before services are completed.

Further as noted, written fee or retainer agreements may be required under court or administrative rules, as in the case of New York.[63]

Second Prong of 1.5(b)

The second prong requires that "except when the lawyer will charge a regularly represented client on the same basis or rate." The communication must be "before or within a reasonable time after commencing the representation."

The second prong of MR 1.5(b) concerns the timing of the lawyer's communication regarding the scope of representation and fees. With one exception, the communication must be before or a "reasonable" time after the lawyer has been hired. This communication of the fundamental terms of the fee agreement would be of little value after services have been performed. At that point, the client would be disadvantaged by the lost opportunity to seek other counsel offering better terms[64] and would have less leverage in the negotiating process.[65] The lawyer may also be disadvantaged if the client refuses to pay under terms to which he had not agreed. In some cases, the failure to timely reach a fee agreement might even render the agreement unenforceable.[66]

The potential disadvantages to the client and lawyer of significant delay in communicating the fundamental terms of the fee agreement are not as great or may be eliminated altogether when the lawyer has previously represented the client in another matter (or matters) at the same basis or rate. For that reason MR 1.5(b) provides greater flexibility as to the timing of a fee agreement in cases where the lawyer regularly represents the client; it is presumed that the client and lawyer already have an understanding that the basis of the fees will be consistent with prior representations.[67] The term "regularly represented" is not clearly defined and in the case where a lawyer has doubts, she should probably err on the side of caution and either reach a new agreement with the client or memorialize the mutual decision not to do so.

In the immigration context, the timing of communicating the terms of a fee agreement may be more flexible if the lawyer already has a companywide representation agreement with fixed fees for handling nonimmigrant visa

[63] See, e.g., 22 NYCCR 1215 requiring written letters of engagement (or retainer agreements) for most matters in which the fee will be over $3000 that include information about the scope of representation, fees and expenses.

[64] See Restatement (Third) of the Law Governing Lawyers (2000), Section 38, cmt. B.

[65] Yarboro Sallee v. Tennessee Board of Responsibility, No. E2014-01062-SC-R3-BP (Sup. Ct. Tenn. July 23, 2015)(based initially on oral agreement to bill at hourly rate, three months later -- after clients had paid approximately $54, 000 in fees, lawyer asserted that client owed her an additional $86,000 based on hourly rate and demanded for the first time that clients agree to a contingency fee agreement was deemed to have charged excessive fees in violation of Rule 1.5(a) and failed to communicate the basis of the fee arrangement within a reasonable time of commencing representation in violation of Rule 1.5(b)).

[66] Starkey v. Estate of Nicolaysen, 773 A.2d 1176 (N.J. Super. Ct. App. Div. 2001) (where lawyer and client had agreed generally to a contingency fee in connection with complicated commercial transactions but lawyer did not reduce the agreement which set forth the contingency percentage until over two years after the onset of the representation, court held that agreement was unenforceable as to the contingency fee because it violated Rule 1.5(b); lawyer was however entitled to a lesser fee based on quantum meruit).

[67] See Comment 2 to MR 1.5(b).

petitions, e.g., for temporary work authorization or labor certifications for employment-based permanent residence where the fee is set with the corporate client on an annual basis. However, if the same lawyer is asked by the company, or an employee of the company to assist with the adjustment of status, immigrant visa or nonimmigrant visa application, the new representation must be discussed, understood, and agreed upon. In particular, the immigration lawyer would need to draft a new fee agreement that clearly states which party is liable for legal fees, the manner in which those fees will be billed and the nature of the services to be performed. If this agreement will be at variance to the type of agreement that the company is accustomed, differences in the agreement should be promptly highlighted to the client. In addition, best practices would require the lawyer to discuss and include in both agreements the existence of dual representation.

An immigration lawyer may also have greater flexibility regarding the terms of a fee agreement where the lawyer represents multiple family members for a family based petition (e.g., an I-130 filed by one sibling for multiple brothers and sisters). In such cases, when the priority date becomes current, the fees for the adjustment of status petition may vary in price based on complications or if there are multiple family members.

As in the case of fee agreements in general, lawyers must check potentially relevant statutes or rules as to the timing of fee agreements.[68]

Third Prong of 1.5(b)

The third prong requires that the "lawyer must also communicate" any "changes in the basis or rate of the fee or expenses."

As in all contract law, any change in a fundamental term of the agreement would require the client's consent, i.e., the same "meeting of the minds" as in the original fee agreement. In order for the client to determine whether to object or seek another lawyer, the client must be given notice of the proposed change. A lawyer may not unilaterally alter the original agreement unless the fee agreement anticipated this possibility and described the basis for any such change.[69] For example, disclosing a change in the basis or rate of the fee or interest to be charged for the first time in a bill for services already rendered would not comply with this sub-section, as it does not provide the client with a meaningful choice.[70] Similarly, where interest is to be charged on unpaid legal fees, though not part of the fee, the rate of interest may be subject to the same standard of reasonableness applicable to fees and comply with all applicable laws, including usury laws.[71] Even when a client appears to have consented to a modification, where the modification benefits the lawyer only, it still may be deemed unenforceable.[72]

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[68] Bankruptcy lawyers are subject to Section 528(a) of the Bankruptcy Abuse Prevention and Consumer Protections Act which requires debt relief agencies to execute a written contract with a bankruptcy client no later than 5 business days from the date they provide bankruptcy assistance services. See, Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229 (2010) (finding that bankruptcy lawyers who provide bankruptcy assistance are debt relief agencies within the meaning of the Bankruptcy Abuse Prevention and Consumer Protections Act).

[69] See In re Marshall, 217 P.3d 291 (Wash. 2009) (among numerous violations of MR 1.5, lawyer who agreed to represent client for flat fee of $5000 impermissibly billed client for over $20,000 in additional fees based on hourly rate); Akron Bar Ass'n v. Naumoff, 578 N.E.2d 452 (Ohio 1991) (lawyer impermissibly converted hourly fee agreement to administer estate into contingency agreement for collection of funds).

[70] See Oregon Bar Ethics Op. 2005-97 ("mere addition" of statement on client's bill that 18% interest will be charged on unpaid balances does not satisfy consent and explanation requirement).

[71] See New York City Bar Ethics Op. 2000-2 (lawyer may charge interest on unpaid legal fees if fee agreement so provides, client consents and the rate is reasonable or if fee agreement is silent, the lawyer notifies the client that he intends to charge interest and the client is given opportunity to pay outstanding balance before interest accrues) See e.g., Wash. DC Ethics Op. 310 (2002)(where client has failed to pay outstanding legal fees, lawyer may seek client's consent to revise fee agreement to include payment of interest charges on future delinquencies as condition to continuing to perform work) See also Comment 5 to MR 1.5.

[72] See In re Thayer, 745 N.E. 2d 207 (Ind. 2001) (lawyer who upon settlement of a personal injury matter presented client with second fee agreement granting the lawyer a higher contingency percentage to which the client agreed, deemed to have collected an unreasonable fee since the higher percentage was unrelated to any additional services provided by the lawyer).

As discussed at pp 4-37, modifications of a fee agreement in which a lawyer seeks to obtain a security interest in the client's property to guarantee payment, the lawyer must also comply with MR 1.8(a).

In the immigration context, a lawyer might seek an additional fee for appearing at an interview, which had not been anticipated, such as in the case of an I-751 joint petition for removal of conditions or a K-1 application for adjustment of status to permanent residence. A lawyer might also seek an additional fee for preparing a response to an unanticipated Request for Evidence or seek additional payments to cover an unanticipated increase in a filing fee that occurs during the course of the representation. In each of these examples, however, the client would have to consent.

State Variations for communicating changes in the basis or rate of fees

States that omit the requirement that lawyers must communicate any changes in the basis or rate of fees:
Alabama
Alaska
California
Florida
Kansas
Michigan
Mississippi
New Hampshire
New Jersey
North Carolina
North Dakota
Oregon (doesn't have equivalent of 1.5(b) at all)
Texas
Virginia
Washington, D.C.

Notably, lawyers practicing in states that do not require that lawyers communicate changes in the basis or rate of the fee and who fail to do so could still run afoul of the requirement of adequate communication under MR 1.4, in particular, MR 1.4(a)(2) requiring "consultation with client about the means by which the client's objectives are to be accomplished" and MR 1.4(b) requiring an explanation of a matter "to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

MR1.5(c): Contingency Fee Agreements

MR 1.5(c) which permits contingency fees arrangements in most circumstances has five prongs.

First Prong of MR1.5(c)

The first prong permits fees that are "contingent on the outcome of the matter for which the service is rendered" except when expressly prohibited in MR 1.5(d) or other law.

Contingency fee arrangements are permitted under MR 1.5(c) subject to certain limitations. Common examples of contingency matters are personal injury and malpractice actions, commercial and estate disputes or any action in which a client basically seeks financial compensation. A contingency fee is generally based on a percentage of the recovery, but it may also be based on a percentage of the amount of money saved, as in tax cases.[73] Limitations on contingency fee arrangements may be imposed under state or federal law, such as a ceiling on the percentage of recovery or the requirement that a lawyer advise the client of alternative fee arrangements, such as an hourly rate or advance flat fee.[74] Although not expressly stated in MR 1.5(c), contingency fee arrangements, like all others, are still subject to the requirement under MR 1.5(a) that the total fee shall not be unreasonable.[75]

Not surprisingly, in order for a contingent fee to be deemed reasonable, there must be an actual contingency of non-recovery.[76] Contingency fee agreements must also comply with other professional responsibility rules, such as those concerning business transactions with clients and conflicts of interests, often when it is clear that the lawyer is taking less risk than the client.[77] Moreover, if the nature of the services provided do not otherwise justify a contingency fee arrangement, as in the case when the work required is minimal and recovery is guaranteed, the fee may be deemed unreasonable.[78] However, there is per se prohibition against contingency fee agreements, even when the legal fee obtained is extraordinarily high as long as it can be established that the client has been given an informed choice of alternative billing arrangements, in particular hourly rate billing.[79] Such agreements also may be appropriate—and ethical—even when the client can afford to pay the lawyer on a non-

[73] See e.g., Storino, Romelo & Durkin v. Rackow, No. 1-14-2961 (Ill. App. Ct. 1st Dist. November 24, 2015) (upholding enforceability of contingency fee agreement based on "savings" realized as a result of lawyer's objections to proposed property assessment where town dismissed its petition to assess special tax and clients received 100% savings in that no tax was imposed, even where lawyer had represented other clients in the matter on the same contingency basis).

[74] See Comment 3 to MR 1.5. NYSBA Ethics Op. 697 (December 30, 1997) (fee in a personal injury matter exceeds Court's fee schedule for certain contingency fees would be unreasonable.

See also Rasner v. Ky. Bar Ass'n, 57 s.w.3d 826 (Ky. 2001) (lawyer engaged in misconduct by failing to advise client of alternative fee arrangements to contingency fee and failed as required to reduce agreement to a writing).

[75] Id., See Angino & Rover v. Jeffrey r. Lessin & Assocs., Pa. Super Ct., No. 941 MDA 2014 (January 5, 2016) (contingency fee agreement which required that if client changed counsel, he had to pay lawyer 20% of recovery obtained by successor counsel deemed unenforceable as interfering with client's unfettered right to change counsel and contrary to Pennsylvania case law holding that in contingency cases, discharged lawyer's fees must be based on "quantum meruit.").

[76] Committee on Legal Ethics of West Virginia State Bar v. Tatterson, 177 W.Va. 356, 352 S.E.2d 107, 113-14 (1986) ("Courts generally have insisted that a contingent fee be truly contingent").

[77] See In re Curry, La. No. 08-B-2557 (July 7, 2009)(where court did not expressly address the reasonableness of a contingency fee, court found that lawyers who entered into a contingency fee agreement with client at point in matter when recovery was not in doubt, violated rules pertaining to improper business transaction with client and conflict of interest); In re Hefron, Ind. No.98500-0006-DI-390 (Jul 7, 2002) (lawyer who pressured client into changing oral per-hour fee agreement to a contingent fee arrangement without disclosing opposing counsel's settlement offer, lawyer attempted to collect an unreasonable fee in violation of Rule 1.5(a) and improperly renegotiated fee without client protections in violation of Rule 1.8(a)_.

[78] Attorney Grievance Com'n v. Kemp, 303 Md. 664, 496 A.2d 672, 678 (1985)(where lawyer's services required only that lawyer submit application to receive recovery under mandatory no-fault payments, one-third contingency fee deemed excessive, as an "improper measure of professional compensation"); Gair v Peck, 6 NY2d 97, 106 (1959)("[c]ontingent fee[ ] may be disallowed as between attorney and client in spite of [a] contingent fee retainer agreement[ ], where the amount becomes large enough to be out of all proportion to the value of the professional services rendered").

[79] See Matter of Lawrence 2014 NY Slip Op 07291(NY Court of Appeals October 28, 2014)(in estate litigation involving a $1 billion real estate empire that continued over 22 years and where legal fees approached $18 million under original hourly based fee agreement, terms of later modified hybrid agreement which included a cap on hourly fees and a 40% contingency fee of monies distributed to the beneficiaries, court declined to find the fee excessive under the circumstances which included that the client was a savvy and sophisticated individual who consulted with independent counsel prior to agreeing to the modified agreement and the fee itself was not excessive on grounds that a 40% contingency fee was not per se unreasonable and that there was no evidence that the lawyers had engaged in any fraud and that agreement itself was free from any misconception on the part of the client).

contingent basis.[80]

Second Prong of MR 1.5(c)

The second prong requires that a contingent fee agreement be in a writing signed by the client.

Unlike MR 1.5(b)'s stated "preference" that all fee agreements be in writing, under MR 1.5(c), contingency agreements must be in writing and signed by the client. A writing merely given to the client would not comply with this subjection. There are no exceptions to the writing and signing requirement. This is a black letter rule the violation of which could be a basis for discipline whether or not the fee is unreasonable.[81] The failure to reduce a contingency fee agreement to writing, however, may not necessarily deprive the lawyer of a fee based on quantum meruit.[82]

Third Prong of MR 1.5(c)

The third prong requires that the written agreement state "the method by which the [contingency] fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal; litigation and other expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated."

In addition to MR 1.5(b)'s requirement that a lawyer communicate the scope of representation and rate or basis for the fees, MR 1.5(c) requires that a lawyer who handles a matter on a contingency must set forth specific terms of the agreement. This is not surprising since contingency agreements present a greater likelihood of misunderstandings and potential disputes, particularly where the clients have little or no familiarity with the legal system or fees. Under this sub-section, the writing must explain the exact method by which the contingency fee will be calculated. For example, in personal injury matters the fee paid to the lawyer may be 33% of the money recovered. Sometimes, where the recovery is expected to be very high, the percentage may be lower. In other cases, where the lawyer may be reluctant to handle the case on a contingency fee basis because she is not optimistic about the outcome and the time working on the matter is expected to be significant, the lawyer may be justified in charging a higher percentage of the recovery.

Fourth Prong of 1.5(c)

The fourth prong requires that the contingency fee agreement "must clearly notify the client of any expenses for which the client will be liable whether or not the client is the prevailing party."

Although the core of all contingency agreements is that the client pays no legal fees if there is no recovery, some lawyers may be unwilling or prohibited from paying the expenses incurred in handling the matter, when there is no recovery. For this reason, the fee agreement must indicate whether the client will be responsible for paying the expenses if he does not prevail in the matter or while not expressly provided in the rule, if the amount of recovery is less than the expenses incurred. Holding a client responsible for expenses not identified in the fee agreement also would likely be deemed unreasonable.

Fifth Prong of 1.5(c)

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[80] See ABA Formal Opinion 94-389 (comprehensive opinion addressing ethical and practical considerations underlying contingency agreements, among them, a list of factors to be considered and discussed with client in light of lawyer's fiduciary duty to client).

[81] See In re Lee, 835 N.W.2d 836 (N.D. Sup. Ct. 2013)(where there is no evidence that lawyer's fee in contingency matter was unreasonable, Rule 1.5(a) should not be used to resolve what is essentially a good faith fee dispute; however, lawyer's failure to put contingency fee agreement in writing is basis for discipline nevertheless); R.W. Granger & Sons, Inc. v. J & S Insulation, Inc. et al, 61, Mass. App. Ct. 92 (Mass. Apt. 2004)(writing requirement for hybrid contingency fee agreement fulfilled under Mass. Rule 1.5(c) by correspondence consisting of three detailed letters between client and lawyer).

[82] See, e.g, Starkey, Kelly, Blaney & White v. Estate of Nicolaysen, 796 A.2d 238 (N.J. 2002)(though oral-contingency fee agreement unenforceable, lawyer entitled to recover reasonable value of his services under quantum meruit theory); In re Williams, 693 A2d 327 (D.C. 1997)(law professor who performed legal services for law student on contingency basis, but did not reduce fee agreement to a writing, was admonished in disciplinary proceeding for failing to use written fee agreement in violation of N.J. Rules 1.5(b) and (c), after he successfully settled fee dispute with client who he had sued in small claims court).

The fifth prong requires that at the conclusion of the contingency matter the lawyer must "provide the client with a written statement stating the outcome of the matter and, if there is a recovery, [show] the remittance to the client and the method of its determination.

This prong requires that upon conclusion of the matter lawyers must account for the recovery funds. This must be done in addition to any advance agreement as to the fee in accordance with MR 1.5. The accounting must be in writing which reflects the outcome of the matter and, where there has been a recovery, the amount of and basis for the amount of money to be remitted to the client.

Because states may impose their own requirements as to contingency fee cases, separate and apart from the rules of professional responsibility, lawyers should be careful to check court or other applicable rules.[83]

State Variations for 1.5(c)

A good number of state variations of MR 1.5(c) provide the form of the contingency agreement that must be employed. Given the complexity of the variations, we do not list those states. Rather, we recommend that lawyers check their applicable state version of MR 1.5(c).

MR 1.5(d): Circumstances Prohibiting Contingency Fee Agreements

MR 1.5(d) concerns the circumstances under which a lawyer is prohibited from entering into a contingency fee arrangement, namely:

> (1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or
>
> (2) a contingent fee for representing a defendant in a criminal case.

Under MR 1.5(c), lawyers are strictly prohibited from charging or collecting a contingency fee in criminal or domestic relations matters. As noted in Comment 6, a lawyer may not base his fee on whether a divorce is actually secured or upon the amount of alimony or support or the property settlement obtained. A lawyer is permitted, however, to contract for a contingent fee for legal representation in connection with the recovery of post-judgment balances due under support, alimony or other financial orders because such contracts do not implicate the same policy concerns.

A plain reading of MR 1.5(d) indicates that contingency agreements in immigration matters are not prohibited.[84] Although immigration matters do not involve relief in the form of money, an immigration lawyer may seek to charge or collect a "success" or "bonus" payment contingent on the client's obtaining the relief/status requested, separate and apart from any other agreed upon fee. Such payments may be subject to the requirements of MR 1.5(c), since they clearly depend on the successful outcome of the matter. A "success" or "bonus" fee would also be subject to the overarching requirement in MR 1.5(a) that the lawyer's fee shall not be unreasonable. A "success" fee charged in cases such as the H-1B lottery program might be deemed unreasonable, for example, because the lawyer's services are not related in any way to a successful outcome. Conversely, immigration lawyers who charge a base flat fee for filing an EB-1 extraordinary ability self-petition may charge a success fee if the petition is approved.

State Variations for 1.5(d)

Some state versions of MR 1.5(d) are explicit in identifying the range of related domestic relations matters that may or may not be handled on a contingency basis. Given the complexity of the variations, we do not list

[83] See, e.g., 22 NYCCR § 603.7 (New York's court rule concerning contingency fee agreements in personal injury matters only requires, among other things, a written fee agreement and closing statement (forms of which are provided), the filing of such agreements with the appropriate authority, and that the percentage fees be in conformity with the schedule set forth in the rule).

[84] As discussed, although 8 CFR 1003.102(a) prohibits the charging of "grossly excessive" fees, there is no express identification of different fee arrangement, including any reference to bonus or success fees.

them here. Rather, we recommend that lawyers check the applicable state version of MR 1.5(d).

MR 1.5(e): Permissibility for Two Lawyers to Divide Fees

Rule 1.5(e) concerns the circumstances under which it is permissible for two lawyers not in the same firm to divide legal fees. Fees may be divided only if:

"(1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;

(2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(3) the total fee is reasonable."

A division of a fee between or among lawyers, also referred to as fee sharing or fee splitting, is a single billing to a client that covers the fees of two or more lawyers who are not in the same firm.[85] Often occurring in contingency fee arrangements, the division of fees encourages the association of more than one lawyer in a matter in which neither alone could serve the client as well. For example, in a litigation matter, the referring lawyer may not have the level of skill or the time to handle a trial and associating with an experienced trial lawyer would best serve the client's interests. In transactional cases, one or more lawyers from different firms may associate as co-counsel for a client's matter and charge the client a single fee which they may divide, rather than billing separately for their services.[86] As noted in Comment 8, MR 1.5(e) does not apply to a division of fees to be received in the future for work done when lawyers were previously associated in a law firm.[87]

MR 1.5(e)(1)

MR 1.5(e)(1) permits lawyers to divide a fee either on the basis "of the proportion of services they render or if each lawyer assumes joint responsibility for the representation as a whole."

Proportionality

In determining whether the proportionality requirement is satisfied, courts may look for a correlation between the fee received and the value of the services rendered by each of the lawyers.[88] Time spent may not be the sole consideration in determining the value of a lawyer's services. A lawyer's expertise, experience and benefit to the client, among others, are also factors that may be considered.[89] As a practical matter, as long as each of the lawyers provides some substantive services in a case and there is no claim that either "refused to contribute more substantially," most courts will apply a more relaxed standard under MR 1.5(e), especially in the case of

[85] See Comment 7 to MR 1.5; ABA Informal Ethics Opinion 99-414(1999).

[86] See Iowa State Bar Ethics Opinion 13-05 (lawyers from different firms associating as co-counsel must comply with Rule 1.5 in addition to other rules involving conflicts of interest and adequate client communication, and scope of representation).

[87] See Comment 8 to MR 1.5. This means that the decision on how fees will be split between the former firm and a lawyer that has departed does not need to comply with the writing and joint responsibility requirements of paragraph (e) of Rule 1.5.

[88] See, e.g., Dugan v. Dorff Constr. Co., 721 N.Y.S.2d 53 (N.Y.App. Div. 2001)(where second firm returned personal injury matter to referring lawyers after one month, and did no further work on the matter, second firm not entitled to two-thirds share of recovery as initially reflected in fee agreement, but limited to pro-rata share based on work performed); Londoff v. Vuylstake, 996 S.W.2d 553(Mo. Ct. App. 1999)(court held oral agreement to split fees 50/50 not enforceable under Rule 1.5(e) where referring lawyer a few hours work and did not assume joint responsibility) , citing McFarland, 316 S.W.2d at 670,("To merely recommend another lawyer or to refer a case to another lawyer and do nothing further in the handling of the case cannot be construed as performing service or discharging responsibility in the case. The service and responsibility referred to in the rule, before a lawyer is entitled to a division of the fees, must relate to an actual participation in or handling of the case.")

[89] See e.g., Waterman v. Kitrick, 572 N.E.2d 250 (Ohio Ct. App. 1990) ("an exactly even division of work is not necessary for a fifty-fifty fee-splitting arrangement, it being sufficient if the division is substantially equal from a quality of work responsibility and value standpoint.")

contributions of "bickering attorneys."[90]

Joint or Shared Responsibility

The term "joint responsibility" has been construed generally as requiring "financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."[91] Joint responsibility does not appear to require that the referring lawyer actively participate in the representation based on the premise that it is an alternative to the proportionality requirement.[92] As expressed in Arizona Bar Opinion 04-02 (March 2004), relying in part on ABA Op. 85-1514, the joint responsibility component of Rule 1.5 is satisfied when the referring lawyer assumes financial responsibility for any malpractice that occurs during the representation, without more. According to the opinion, the term does not require that the referring lawyer assume any supervisory responsibility.[93] Because the concept of joint responsibility subjects the referring lawyer to a malpractice claim, and as suggested in the Comments, this responsibility encourages a lawyer to refer matters to lawyers whom the lawyer reasonably believes is competent to handle it.

As a practical matter, lawyers should check with their malpractice carriers to verify coverage before assuming joint responsibility in division of fee arrangements.

A lawyer may not ethically divide a fee even when he is willing to assume joint responsibility, such as in cases where the referring lawyer is disqualified or otherwise conflicted, given that a lawyer who is not able to assume sole responsibility for a matter may not assume joint responsibility.[94] The same principle applies to division of fees, based on joint responsibility, with suspended or disbarred lawyers, given that under MR 5.4 a lawyer may not share fees with a nonlawyer.[95]

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[90] See e.g., Samuel v. Druckman & Sinel LLP, 855 N.Y.S.2d 90 (N.Y. App. Div. 2008) (lawyer entitled to one-third share of fee based on his contribution to legal work and there is no claim that he refused to contribute more substantially).

[91] See Comment 7 to MR 1.5.

[92] See ABA Informal Ethics Opinion 85-1514 (1985); Kummerer v. Marshall, 971.

[93] As noted as follows in the Arizona opinion, there is some disagreement among jurisdictions as to whether joint responsibility requires some substantive involvement by the referring lawyer:

Other jurisdictions disagree whether "joint responsibility" must entail substantive involvement by the referring attorney, such as supervision of the other lawyer's work, or merely financial responsibility. Compare ABA Informal OP. 85-1514, supra; McFarland v. George, 316 S.W. 2d 662, 671-72 (Mo. Ct. App. 1958) ("responsibility" under Missouri's ethical rules means substantive involvement); Ohio Bd. Comm'rs of Grievance and Discipline Op. 2003-3 (concluding that "responsibility" means referring lawyer must be available to other lawyer and client throughout the representation and remain knowledgeable about progress of matter); Wis. State Bar, Formal Op. E-00-01 (same), with Aiello v. Adar, 750 N.Y.S.2d at 465 (joint responsibility is synonymous with joint and several liability; vicarious liability for any act of malpractice is sufficient assumption of responsibility). See also N.Y. County Lawyers' Association Comm. Professional Ethics Opinion 715 (1996) (referring attorney who assumes joint responsibility in exchange for legal fees is ethically obligated to accept vicarious liability for any act of malpractice that occurs during the course of the representation, but not required to supervise the activities of the receiving lawyer); III. Jud. Ethics Comm. Op. 94-16 ("acceptance of legal responsibility" required by Illinois professional ethics rule "consists solely of potential financial responsibility for any malpractice action against the recipient of the referral"); Chicago Bar Association Professional Responsibility Comm. Op. 87-2 at 4 (same).

[94] See ABA Formal Ethics Op. 474 (April 21, 2016) (conflicted lawyer who refers matter to non-conflicted lawyer may not share legal fees with nonlawyer under MR 1.5, even if client consents, if the conflict itself it not waivable under MR 1.7); New York State Bar Op. 745 (2001) (lawyer disqualified from a matter on non- consentable conflict of interest grounds may not receive a referral fee; lawyer with a consentable conflict of interest who refers the matter to another attorney may receive a referral fee); Nassau County Bar Op. 98-7 (1998) (lawyer prohibited from assuming sole responsibility for a matter due to a conflict of interest is also prohibited from assuming joint responsibility for a referred matter).

[95] Under MR 5.4, a lawyer generally may not share fees with a nonlawyer and accordingly a referring lawyer who is disbarred or suspended from the practice of law cannot earn a referral fee, on the basis of joint responsibility. See Rhode Island Sup. Ct. Op. 91-71 (Oct. 1991); Indiana St. Bar Op. 9 (1991); Oregon Formal Opinion 2005-25 (revised 2014) (where Or. Rule 1.5 is silent as to basis for division of fee (proportionality or joint responsibility) advises that since suspended or disbarred lawyer is deemed a nonlawyer, he may only share fees on a quantum meruit basis for work performed prior to suspension or disbarment); Florida Bar Op. 90-3 (1991)("referring attorney who is suspended or disbarred at some point during the representation becomes unable to fulfill the contractual obligations of responsibility and availability and, therefore, should not receive the entire portion of the fee that he or she contracted for in the required written agreement.

MR 5.4's prohibition against sharing fees with a nonlawyer may also be implicated in cases involving a jurisdiction which permits nonlawyers to have a financial interest in a law firm, as in the case of Wash. D.C.[96] and some foreign countries.[97] In such cases, it could be argued that a lawyer or law firm ("lawyer one") that shares a fee with a firm that has nonlawyer members who have a financial interest in the firm ("lawyer two") is improperly sharing the fee with a nonlawyer because the nonlawyer derives income from his interest in the firm. Although the issue has not been universally resolved, there is authority that advises that lawyer one would not be deemed to have violated MR 5.4 by sharing legal fees with lawyer two.[98]

State Variations in MR 1.5(e)(1)

Not all states have adopted the alternate requirements in MR 1.5(e)(1), i.e., proportionality or joint responsibility.

State Variations of Proportionality and/or Joint Responsibility
Alabama (in contingency fee cases only): disregard both proportionality and joint responsibility
California (under Rule 2-200): disregard both proportionality and joint responsibility
Connecticut: disregard both proportionality and joint responsibility
Delaware: disregard both proportionality and joint responsibility
Hawaii: both proportionality *and* joint responsibility are required. [99]
Kansas: disregard both proportionality and joint responsibility
Louisiana: requires lawyer to provide "meaningful services" but does not refer to assumption of responsibility.[100]
Maine: disregard both proportionality and joint responsibility
Michigan: disregard both proportionality and joint responsibility
New Hampshire: disregard both proportionality and joint responsibility
Nevada: disregard both proportionality and joint responsibility
Oregon: disregard both proportionality and joint responsibility
Pennsylvania: disregard both proportionality and joint responsibility

Instead, the suspended or disbarred referring attorney ethically may receive payment on a quantum meruit basis for the responsibility that he or she did assume and the time that he or she was available for consultation while licensed to practice from practice.")

[96] See, e.g., Wash. D.C. Rule 5.4(b) which sets forth exceptions to the general proscription of sharing legal fees with a nonlawyers. That rule permits a lawyer to practice in a partnership or organization in which "an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients" has an ownership interest in a law firm. Wash. D.C. Rule 5.4(a) expressly permits the sharing of legal fees with such firms or organizations.

[97] See NYSBA Ethics Op. 911 (describing "UK entity that may be formed as an Alternative Business Structure under the UK's Legal Services Act, which permits entities with non-lawyer supervisors and owners to render legal services" while advising a "New York lawyer may not practice law principally in New York as an employee of an out-of-state entity that has non-lawyer owners or managers.").

[98] See ABA Formal Opinion 464 (concluding that division of fees with other lawyers who may lawfully share fees with nonlawyers under applicable rules, does not violate MR 5.4; "…. possibility that the …[other] firm may, or may not, eventually 'share' some fraction of that firm's portion of the fee with a nonlawyer should not expose the lawyer in the Model Rules jurisdiction to discipline."; City Bar of New York Formal Opinion 2015-8 (New York lawyer does not violate New York rule 5.4 (prohibiting sharing fees with nonlawyer) by sharing fees with lawyer who practices in law firm that allows nonlawyers to have financial interest or managerial authority in that firm).

[99] See Rule 1.5(e)(1) of the Hawaii Rules of Professional Conduct.

[100] See Rule 1.5(e) of the Louisiana Rules of Professional Conduct.

Virginia: disregard both proportionality and joint responsibility

Washington: permits a division of fees

Wyoming: both proportionality *and* joint responsibility are required.

Alabama (in contingency fee cases only), California (under Rule 2-200), Connecticut, Delaware, Kansas, Maine, Michigan, New Hampshire, Nevada, Oregon, Pennsylvania and Virginia disregard both proportionality and joint responsibility requiring only client consent to the division of fees and that the total fee remains reasonable.

Washington permits a division of fees "between the lawyer and a duly authorized referral service of the state or county bars."[101] In New Jersey, with respect to lawyers designated as "certified" under New Jersey Rule 1:39, fees may be divided without regard to proportionality or joint responsibility.[102]

Immigration lawyers, and others, should check applicable state rules and other law concerning fee sharing with firms that include nonlawyer members.

MR 1.5(e)(2)

MR 1.5(e)(2) requires that the client agree "to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing."

MR 1.5(e)(2) requires written client consent not only to the division of fees, but also the share each lawyer will receive.[103] The failure to obtain written consent to the terms of the division of fees agreement as to joint responsibility has been held to be more than a mere technical violation, and where there is a dispute between lawyers as to the appropriate share of fees will render the alleged agreement unenforceable. [104] However, there is not universal agreement among courts on the question of enforceability when a division of fee agreement fails to comply with the letter of the state's applicable rule.[105]

Neither the rule nor the Comments to MR 1.5 address the question of the timing of the consent to the division of fees, but some state versions of the rule do.[106] Best practice would suggest that the consent be obtained as soon as possible, given that MR 1.5(b) requires generally that consent to the terms of such fee agreements should be obtained "before or within a reasonable time after commencing the representation."

Although MR 1.5(e) is also silent on the question of which lawyer should assume responsibility for obtaining client consent to the division of fees, since the Model Rules apply to all individual lawyers, best practice would

[101] See Rule 1.5(e)(2) of the Washington State Court Rule: Rules of Professional Conduct.

[102] See N.J. Rule 1:39-6(d) which provides that a:

certified attorney [except in matrimonial cases] who receives a case referral from a lawyer who is not a partner in or associate of that attorney's law firm or law office may divide a fee for legal services with the referring attorney or the referring attorney's estate. The fee division may be made without regard to services performed or responsibility assumed by the referring attorney, provided that the total fee charged the client relates only to the matter referred and does not exceed reasonable compensation for the legal services rendered therein. The provisions of this paragraph shall not apply to matrimonial law matters that are referred to certified attorneys.

[103] Contingency fee agreements must be in a writing signed by the client and must otherwise comply with MR 5.5(c).

[104] See e.g., Eng v. Cummings, McClorey, Davis & Acho PLC, 611 F.3d 428 (8th Cir. 2010)

[105] See, e.g., Freeman v. Mayer, 95 F.3d 569, 574-75 (7th Cir. 1996) and cases cited at n. 11, id.

[106] See, e.g., Virginia Rule 1.5(e)(4) which requires that consent to division of fees must be "obtained in advance of the rendering of legal services, preferably in writing" and Texas Rule 1.04(f)(2) which requires that the client must consent in writing "prior to the time of the association or referral proposed."

suggest that each of the lawyers participating in a division of fees lawyer should ensure that such consent has been obtained.[107]

While most states have adopted the consent requirements in MR 1.5(e)(2), some states are less stringent in that they do not expressly require the additional disclosure of how the lawyers intend to apportion the fee. Those states include Alabama, Kansas, Kentucky, Maryland, Missouri, North Dakota, Oklahoma, Oregon, Pennsylvania, Tennessee, West Virginia and Wyoming.

MR 1.5(e)(3)

MR 1.5(e)(3) requires that "the total fee is reasonable."

MR 1.5(e)(3) reiterates the point that the overall fee cannot exceed a "reasonable" amount, in accordance with MR 1.5(a). Even if the individual fee is reasonable, if the accumulated charges are unreasonable, the rule is violated.[108]

In the immigration context, an immigration lawyer may have a removal case based on a criminal conviction and refer the client to a criminal defense lawyer under an arrangement where the client pays a single fee which will be divided between the immigration lawyer and the criminal defense lawyer. Some lawyers may limit their practices to appearances before USCIS only and may refer the client to a lawyer who regularly appears before EOIR in trial or appellate matters, under a similar fee sharing arrangement.

Disputes arising from division of fee agreements may be addressed in litigation between lawyers, in professional discipline investigations based on a client or lawyer complaint, or both.[109] Although it appears that a majority of courts have found that agreements that do not comply with Rule 1.5 are unenforceable, some courts have not so held when the lawyer relies on violation of the rule for his own financial benefit.[110]

Special Areas of Concern

Alternate Fee Dispute Resolution

When a client objects to the amount of a fee after legal services have been rendered, lawyers face hard choices. On one hand, the lawyer usually wants to maintain good relations with the client. On the other hand, a law practice is a business and in business, one has a legal right to be paid for work performed. Because the lawyer-client relationship is one of trust, in the first instance a lawyer may try to discuss the bill with the client to persuade him that the fee is justified. In some cases, the lawyer may choose to work out a compromise with the client and reduce the fee, or even write the fee off altogether, if attempts at collection may prove futile. Some lawyers may decide that the circumstances justify litigation and may decide to sue the client altogether. As a

[107] See Margolin v. Shermaria, 102 Cal. Rptr. 502 (Cal. Ct. App. 2000) (law firm not able to enforce an oral fee-splitting agreement where the lawyer to whom the case had been referred failed to obtain the client's written consent as required by Cal. Rule 2-200 (analogous to Rule 1.5) and declined to apply equitable estoppel principles since the rule designed to protect consumers, not attorneys)

[108] See in re Martin, 67 A3d 1032 (Wash. D.C. 2013) (in complicated litigated commercial matters which required participation by local counsel, even if the first lawyer's fee were reasonable [which the court did not find], the total fee became unreasonable when combined with the fees charged by other counsel).

[109] Fohrman v. Alberts, P.C. , No. 1-12-3351, (Ill. App. Ct. March 14, 2014)(attorneys liens based on fee-splitting arrangements that did not strictly comply with Rule 1.5(e) deemed unenforceable as against public policy, where oral fee agreements did not set forth how the attorney fees would be split or shared by the firms, did not provide that each firm had assumed joint financial responsibility for the matters and there was no written confirmation by client of the fee-sharing arrangement); Neilson v.McCloskey, 186 S.W.3d 285 (Mo. Ct. App. 2005)(where fee splitting arrangement not reduced to a writing, no client consent obtained and no joint responsibility, alleged oral agreement to share fees 50/50 did not comply with state's rule 1.5 and therefore not enforceable).

[110] See Grasso v. Galanter, 2:12-CV-738-GMN-RJJ (D. Nev. Sept. 20, 2013) (where defendant lawyer asserted that fee sharing agreement not enforceable under Rule 1.5 because it was not in writing and client did not consent; court denied motion to dismiss on basis that the lawyer should not be permitted to use his own violation to shield himself from his contractual obligation."); Frickey v. Turner, P.C., 94 P.3d 1266 (Colo. Ct. App. 2004) (Rule 1.5(e) "should not be too readily construed as a license for attorneys to break a promise, go back on their word, or decline to fulfill an obligation, in the name of legal ethics.")

practical matter, commencing litigation against a client often results in malpractice counter-claims based on negligent representation as well as other related causes of action.

Comment 9 to MR 1.5 recognizes that some jurisdictions have established formal procedures for resolution of fee disputes —such as arbitration or mediation—that are mandatory for lawyers. Although the Comment does not indicate whether the failure to participate would amount to an ethical violation, a lawyer's failure to participate in mandatory fee arbitration could implicate MR 8.4(d) which prohibits lawyer conduct that is "prejudicial to the administration of justice." In at least one jurisdiction in which fee arbitration is mandatory, lawyers who fail to participate are referred to the appropriate disciplinary authority for appropriate action.[111] However, even when such fee dispute resolution procedures are voluntary, Comment 9 urges lawyers to "conscientiously consider submitting" to those procedures.

Whether or not a jurisdiction has established alternate fee dispute programs of any type, nothing in the Model Rules prohibits a lawyer from including in a fee agreement a provision that requires binding arbitration of disputes concerning fees or even malpractice claims.[112] While not specifically addressed in MR 1.5, any lawyer seeking to include such a provision should abide by the spirit of MR 1.5(b) regarding adequate communication of the scope of the representation and basis or rate of the fee as well as the letter of MR 1.4(b) which would require the lawyer to "explain" the implications of binding arbitration "to the extent reasonably necessary to permit the client to make [an] informed decision" about whether to agree to inclusion on binding arbitration in the agreement.[113]

Survey of State Alternate Fee Dispute Programs	
States which have established Mandatory Fee Dispute Arbitration or Mediation Requirements[114]	Alaska, California, Maine, Montana, New, Jersey, New York, North Carolina, South Carolina, Wyoming
States which have established Voluntary Fee Dispute Arbitration or Mediation Programs	Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Ohio, Oregon, Rhode Island, Utah, Virginia, Wisconsin
States in which Alternate Fee Dispute Programs are likely administered through local bar associations[115]	Alabama, Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, New Hampshire, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, West Virginia

[111] In New York, 22 NYCRR §137 provides in pertinent part that in "accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged. 22 NYCRR §137.11 provides that a lawyer "who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee… for appropriate action."

[112] See ABA Formal Ethics Op. 02-425. It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement, under MR 1.4(b) among others.

[113] Id.

[114] See ABA Survey of State Mandatory Fee Arbitration programs available http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/fee_arb_chart.authcheckdam.pdf

[115] See, e.g., "Fee Disputes" by Martin Cole, Mar. 14, 2011, available at http://mnbenchbar.com/2011/03/fee-disputes/(stating that Minnesota District bar associations maintain fee arbitration panels to hear and resolve fee disputes); Dallas Bar Assoc. Fee Dispute Committee available at http://www2.dallasbar.org/documents/Rules%20for%20Fee%20Arbitration.pdf

Interplay between MR 1.5 and MR 1.15(c): Advance Fees and Trust Accounts

As discussed, the requirement that a fee may not be unreasonable under MR 1.5(a) and each of the other requirements set forth in MR 1.5 are based on the lawyer's fiduciary responsibility to clients which transcends the typical arms-length contractual arrangement.[116] That same fiduciary duty is implicated when a lawyer has access to or is entrusted to hold the property of a client or third person. Among other things, MR 1.15, entitled "Safekeeping Property," sets forth the lawyer's obligation to segregate client or third-party funds from the lawyer's other funds, keep appropriate records (MR 1.15(a)) and promptly disburse funds to which the client or third party is entitled (MR 1.15 (d)).[117] MR 1.15(c) expressly addresses the handling of legal fees requiring that fees paid in advance be deposited in a client trust account and prohibiting withdrawal of such fees only until they are "earned."[118]

As we discussed earlier, a fee that is "paid in advance" or an "advance fee" taken literally refers only to the timing of the payment. Although MR 1.15 provides no further explanation of the term, taken in context, it refers to a fee that is yet to be earned. The general view is that if the fees paid in advance have not yet been earned, then such fees in the lawyer's possession would be deemed the client's property (not the lawyer's) and subject to the general safeguarding requirements in MR 1.15.[119] Some jurisdictions, such as New York, take a different view in that fees paid in advance as a deposit for future services may be deemed the lawyer's property upon receipt, with the caveat that they are still subject to refund of any unearned portion.[120]

Although not expressly addressed in MR 1.15, if the advance fee has been paid by someone other than the client, it follows that those advance fees be treated as third-party funds subject to MR 1.15(c) as well, the point being that until the lawyer provides legal services to the client, the funds are the third-party's property. In such cases, although not required under MR 1.8(f), which addresses potential conflicts that may arise when a third-party pays the legal fee,[121] best practice would be for the lawyer to communicate how the funds will be handled to both the client and the third-party payer.[122]

Complying with MR 1.15(c) should not create a problem for lawyers; the rule is simple as long as it is clear who owns the funds, a matter that may require agreement between the client and the lawyer.[123] Is the fee paid in

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[116] C. Wolfram, Modern Legal Ethics§4.8 at 178.

[117] See MR 1.15(a) and MR 1.5(d).

[118] MR 1.15 (c) provides that a "lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance."

[119] See Brickman, The Advance Fee Payment Dilemma: Should Payments Be Deposited to the Client Trust Account or the General Office Account, 10 Cardozo Law Review, 647, 650 n. 29 (1989); Disciplinary Board v. Matson, 869 N.W.2d 128 (N. Dak Sup. Ct. 2015).

[120] It should be noted that New York has not adopted MR 1.15, instead retaining the substance of its original Code rule DR 9-102(A) which does not address advance fee payments at all. See NYSBA Ethics Opinion 816 (2007) (reaffirming NYSBA Ethics Op. 570 (1985) (advising that a lawyer may ethically accept an advance payment retainer, place such funds in the lawyer's own account, and retain any interest earned.").

[121] See MR 1.8(f) which provides as follows:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or

(3) information relating to representation of a client is protected as required by Rule 1.6.

[122] See "Being Paid by Someone Other Than Your Client", Oregon Law Practice Management, April 23, 2012 available at http://oregonlawpracticemanagement.com/2012/04/23/being-paid-by-someone-other-than-your-client (recommending that unless issue is addressed in written fee agreement, funds are the property of the party who paid the fee).

[123] In re Sharif, Mass. No. SJC-10708 April 27, 2011(in determining disbarment is not automatic when lawyer intentionally converts clients funds and charges excessive fee, court considers possibility of confusion as to nature of fee where use of the word "retainer" may simply mean funds advanced for payments of fees to be withdrawn when earned or what is described as a "true retainer" where funds are paid to

advance essentially a deposit against legal work to be performed in the future, billed on an hourly rate or as a flat fee? If so, then the client or third party owns the funds. Or, is the fee deemed earned upon receipt, as in the case of the "general" or "true" retainer. If so, then the funds become the lawyer's property as soon as she receives them ("earned on receipt").[124] As we discuss in detail below, to the degree that a fee is actually earned upon receipt, it may be accurately referred to as a "non-refundable" fee and as such could ethically be deposited in the lawyer's office operating account.[125]

As we do not provide a comprehensive discussion of MR 1.15 in this EC or include a summary of state variations in the rule, lawyers are strongly advised to check the applicable state version of MR 1.15(c). Readers should note that MR 1.15 will be the subject of a separate EC in this series.

Interplay between MR 1.5 and MR 1.16(d): Non-Refundable and Minimum Fees

Closely related to MR 1.5's fundamental prohibition against charging or collecting a fee that is unreasonable is the requirement under MR 1.16(d) that upon withdrawal or discharge, a lawyer must return the unearned portion of any legal fee already paid to him.[126] As discussed, an unearned fee that is not returned may also be deemed an unreasonable fee. In the normal course, when there is insufficient support that the lawyer performed the agreed-upon legal services, the fee will be deemed unearned and subject to a refund, irrespective of its characterization. In an attempt to circumvent the requirements of MR 1.16(d), lawyers may choose to characterize their fees as "nonrefundable," "earned upon receipt" or a 'minimum" in fee agreements. However, the only fee paid in advance that would not be subject to a refund under MR 1.16(d) would be a general or true retainer paid to secure the lawyer's availability or lost opportunity. However, the mere designation of a fee as a general or true retainer, or as more often the case, as a "nonrefundable" fee, will not on its face permit the lawyer to retain the fee.[127] It is generally understood that under MR 1.5 the lawyer bears the burden of showing that the fee was not unreasonable.[128]

The facts and analysis by the New York Court of Appeals in Matter of Cooperman, 83 N.Y.S 2d (1994), are instructive. In Cooperman, the lawyer entered into a fee agreement with one client in a criminal matter in which the client agreed to pay an advance fee described as a "minimum fee" that was "non-refundable" if the client terminated the representation before the lawyer completed the agreed upon services. Cooperman also entered into another fee agreement which described the required advance fee payment as a "minimum fee" that would remain the same regardless of the number of court appearances entered by the lawyer or if the lawyer was discharged. Both clients terminated the respective representations before completion of the matters, but Cooperman refused to return any portion of the fees on the basis of the agreed upon language in the retainer agreements.

The court held that non-refundable fee agreements generally violated the lawyer's obligation to return an unearned fee upon termination of the representation (under NY's Code similar to MR 1.16(d)). In particular, by

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secure lawyer's future availability; and also as to distinction between advances for fees versus expenses where rules permits advances for fees to be placed in lawyer's operating account); Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct v. Frerichs, 671 N.W.2d 470 (Iowa 2003) (generic statements in fee agreement that are overly broad, insufficient to justify nonrefundable fee that becomes property of lawyer upon receipt; among other things, lawyer failed to deposit such funds in client trust account).

[124] Under MR 1.15(a), since a lawyer must keep her own funds separate from client or third party funds, the lawyer must not commingle such funds. As a practical matter, the lawyer would be required to deposit the earned fees in in his operating account.

[125] See e.g., Arizona Ethics Op. 99-02 (1999) (proper nonrefundable fee becomes property of the lawyer upon receipt and therefore need not be placed in in client trust account).

[126] MR 1.16(d) provides in pertinent part that "upon termination of representation, a lawyer shall refund … any advance payment of fee or expense that has not been earned or incurred."

[127] In re Kendall, 804 N.E.2d 1152 (Ind. 2004) (advance payments for future services are by definition refundable; therefore, agreement characterizing advance payments as nonrefundable violated reasonableness requirement of Rule 1.5(a)).

[128] See, e.g., King v. Fox, 7 N.Y.3d 181 (2006); Shaw v Manufacturers Hanover Trust Co., 68 N.Y.2d 172, 176 [1986]) (with regard to lawyer fee agreements, "courts as a matter of public policy give particular scrutiny to fee arrangements between attorneys and clients, casting the burden on attorneys who have drafted the retainer agreements to show that the contracts are fair, reasonable, and fully known and understood by their clients.")

essentially requiring the client to forfeit his right to a refund, such agreements chilled the client's fundamental right to terminate the representation for any reason and retain other counsel.[129] Cooperman argued that his non-refundable fees were not improper because they were not "excessive" under the then applicable code provision, but the court rejected that argument opining that "the reasonableness of a particular nonrefundable fee cannot rescue an agreement that impedes the client's absolute right to walk away from the attorney." The court also sustained the charge that Cooperman's failure to return the unearned portion of the fee amounted to an "excessive" fee under the then NY code (similar to MR 1.5(a)). Although the Cooperman case involved the use of the term "minimum fee," the court declined to find that the minimum fee agreement violated the code per se, as long as the "minimum fee arrangements and general retainers" are not linked to a "non-refundability impediment irrespective of any services."

As reflected in Cooperman and other court opinions, the objection to nonrefundable fees is based on two fundamental principles. The first is that the nonrefundable fee interferes with the client's absolute right to terminate the representation by causing the client to waive his right to a refund if he does so prior to the conclusion of the matter. The second is that an unearned fee that is not returned is by definition unreasonable under MR 1.5.

Other courts have applied the same analysis supporting the conclusion that the only permissible application of a non-refundable fee clause is the case of a fee that has truly been earned upon receipt.[130] The Arizona Supreme Court so held when it found that a lawyer could not ethically refuse to return fees paid in advance solely on the basis of his fee agreement which provided that the "initial retainer is earned upon receipt and is non-refundable." The court, however, declined to hold that the designation of a fee as non-refundable is a per se violation of Rule 1.5 given that there may be circumstances— as in the case of a true general retainer— where the fee may in fact be earned on receipt.[131]

As previously noted, lawyers may not avoid the proscription against impermissible non-refundable fees through the use of ambiguous or otherwise undefined terms in a fee agreement, as a Washington State lawyer learned too late. The lawyer had used the term "earned retainer" in charging the client $25,000 to handle a settlement of a commercial matter, but never defined the term or explained that it could be interpreted—as he would later do— as literally earned on receipt and non-refundable. The court deemed the fee agreement, which also referenced hourly rates for services, unclear. Because the evidence showed that the lawyer had essentially

[129] See Martin v. Camp, 219 N.Y. 170, 176, 114 N.E. 46, 48 (1916) ("discharge of the attorney by his client does not constitute a breach of the contract, because it is a term of such contract, implied from the peculiar relationship which the contract calls into existence, that the client may terminate the contract at any time with or without cause.")

[130] Wong v. Michael Kennedy, 853 F. Supp. (E.D.N.Y 1994)(relying on Cooperman, court held that only when retainer is paid solely for lawyer's availability may it be called a general retainer and made non-refundable; when client contracts for specified services, agreement is deemed a special retainer and advance fees cannot be deemed nonrefundable); see also e.g., Alaska Ethics Op. 2009-01 (2009) (misleading to describe fee or retainer as non-refundable, unless the fee is paid to ensure that the attorney is available to the client such that the attorney must refuse other employment and cannot represent an opposing side); Mass. Bar Ethics Opinion 95-2 (1995)(citing Cooperman, unethical for lawyer to include nonrefundable advance fee requirement in retainer agreement, as the funds belong to the client until they are earned).

[131] Matter of Hirschfeld, 960 P.2d 640 (Ariz. 1998) (where lawyer was not charged with violating Rule 1.16, lawyer who failed to refund unearned portion of fees paid in advance in eight domestic relations matter deemed to have violated Rule 1.5); See also Cuyahoga Cty. Bar Assn. v. Okocha (1998), 83 Ohio St.3d 3, 6, 697 N.E.2d 594. (finding that non-refundable retainers appropriate "only in very limited circumstances, such as an engagement to remain available and forgo employment by a competitor of the client"); Columbus Bar Assoc. v. Halliburton-Cohen, 832 N.E.2d 42 (Ohio 2005) (court distinguished the lawyer's claimed lost opportunity in a divorce matter from a non-refundable general retainer where a lawyer is asked to forgo working for a client's competitor or must remain generally available to the client, given that once respondent consulted with and/or agreed to represent client, she was ethically foreclosed on the from representing any other party in the matter); Iowa Supreme Ct. Bd. of Prof'l Ethics Conduct v. Apland, 577 N.W.2d 50, 58 (Iowa 1998)(unethical for a lawyer to enter into a fee contract providing for a nonrefundable advance fee unless the advance fee constitutes a general retainer); Utah State Bar v. Jardine, 289 P.3d 516 (Utah Sup. Ct. 2012) (court rejected lawyer's argument in support of non-refundable fee that fee was earned on receipt by the "peace of mind" provided to client by virtue of his agreement to represent her).

neglected the matter and thus had not earned the fee, the lawyer was found to have violated Rule 1.5(b), among other rules, and ordered to pay $15,000 to the client in restitution.[132]

An Iowa lawyer's minimum fee agreement was also found to violate the then applicable codes regarding excessive fees and proper handling of client funds, notwithstanding the lawyer's arguably meticulous use of language to render the fee non-refundable. The fee agreement provided in pertinent part that the:

> minimum [$10,000] fee is based upon the time, skill involved, the experience, reputation and ability of the lawyers, how this case may impact on other cases that cannot be taken because of time commitments required herein, time limitations imposed by the client or the case itself and other proper factors. It is not the desire of the attorney to impact the Client's absolute right to freely discharge Client's attorney or to in anyway impede client[']s rights to discharge attorney. . . Although client will receive credit against the minimum fee based upon rates of $150.00 [per hour] for [the lawyer] . . . a minimum fee will be deemed earned upon execution of this contract.[133]

The Court aptly analyzed the issue as follows:

> The contract addressed availability, but not in the manner used to justify a general retainer. Availability in this context amounted to nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client. A lawyer who agrees to perform legal services also necessarily agrees to be available to perform those services. Thus, this type of availability is unrelated to the type of availability of a general retainer and is insufficient to justify a nonrefundable minimum fee. Moreover, informing a client that the imposition of a minimum fee is not intended to alter their client's right to freely discharge the attorney does not lessen the penalty imposed for exercising the right, or alleviate the inconsistency between a nonrefundable advance fee and the trust-based aspect of the absolute right to discharge an attorney.[134]

On the basis of the analysis and holding of the above cases, it is clear that except where a fee is earned upon receipt, the mere use of the terms "non-refundable," "minimum" or "earned upon receipt" will never justify a lawyer's refusal to return otherwise unearned fees and in some cases may even violate a state's rules. As we show below, a number of state versions of MR 1.5 expressly address the use of such terms and impose additional requirements on lawyers who use them in their fee agreements.

State Variations

Notwithstanding the nuanced variations from MR 1.5 which make reference to non-refundable fee agreements, none of the state rules listed below permit a lawyer to retain a fee paid in advance for specific legal services to be performed at a later time unless those services are actually performed and the fees were earned. As previously discussed, terminology alone will not relieve a lawyer from the obligation to return any unearned fees upon termination.

Arizona's Rule1.5(d) prohibits fees denominated as earned upon receipt, non-refundable or other similar terms unless the client is simultaneously advised in writing that the client may discharge the lawyer at any time and be entitled to a return of that amount is reasonable under the rule.

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[132] In re Van Camp, 171 Wn. 2d 781 (2011) (lawyer found to have charged unreasonable fee in violation of Rule 1.5(a) and failed to explain "clearly at the outset of representation how his fee would be calculated and/or how the client's $ 25,000 [advance]payment would be applied in violation of" Rule 1.5(b) and Rule 1.4(b)).

[133] Iowa Sup. Ct. Bd. of Prof'l Ethics and Conduct v. Frerichs, 671 N.W.2d 470 (Iowa 2003) (court reasoned that although the contract addressed "availability" which might justify a general retainer, the term under the facts of the cases "amounted to nothing more than the ethical obligation imposed on all lawyers when they agree to provide legal services to a client").

[134] Id. at 477.

Colorado's Rule 1.5(g) prohibits any fee denominated as a non-refundable or retainer which restricts the client's right to terminate the representation or obtain a refund.[135]

Delaware's Rule 1.5 (f) permits payment of advance fees as long as it is made clear that they are subject to refund of unearned fees. Delaware also incorporates a requirement concerning safeguarding fees in that the lawyer is required to maintain advance fee payment in a trust account to be withdrawn only as earned and upon notice to the client.

Hawaii's Rule 1.5(b) permits advance payment of fees but states they are presumed not earned and must be held in a trust account in accordance with Hawaii's Rule 1.15.

Kentucky's Rule 1.5 permits the designation of a fee as a "non-refundable retainer", but requires that the non-refundable retainer fee agreement be in writing signed by the client as evidence of "the client's informed consent", stating the dollar amount of the retainer, how it will be applied to the scope of the representation and the time frame in which the agreement will exist. Comment 11 states that such fees may be placed in the lawyer's operating account but the amount of the fee must be reasonable and comply with Rule 1.5.[136]

Maine's Rule 1.5(h) permits designations of a fee as "non-refundable," "earned upon receipt," "guaranteed minimum," subject to detailed enumerated limitations, among them, (1) confirmation in writing that the fee is non-refundable and a description of the services the client will receive in exchange for the fee, (2) the fee agreement does not require the client to waive the right to challenge the reasonableness of the fee and (3) that is made clear to the client that the fee will be deemed earned even if the representation is terminated. As defined, the term "advance fee" is a fee paid for services to be provided and "non-refundable fee" may be paid for paid for "retaining the attorney's availability alone" or in exchange "for the right to receive specified services in the future for no additional fee, or for a stated fee."[137]

New York's Rule 1.5(d)(3) prohibits a lawyer from entering into any arrangement for a "nonrefundable retainer fee" but permits a lawyer to enter into a retainer agreement with a client containing a reasonable minimum fee

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[135] See In Matter of Gilbert, 343 P.3d939 (Col. 2015) (after termination of representation, immigration lawyer permitted to retain portion of advance payment of flat fee that was earned on quantum meruit basis, while at the same time refunding portion of the fee that was not earned, even though fee agreement did not refer to benchmarks or milestones to which portions of the flat fee would apply) available at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2013/13SA254.pdf

[136] See Kentucky Bar Ethics Op. E-380(1995) which criticizes as perceived Cooperman's "overly simplistic" prohibition of nonrefundable fees, but still acknowledging that only fees that are truly earned upon receipt may be designated as non-refundable.

[137] Maine Rule 1.5(h) provides as follows:

(h) A lawyer may enter into an agreement for a client to pay a nonrefundable fee that is earned before any legal services are rendered. The amount of such an earned fee must be reasonable, like any fee, in light of all relevant circumstances. A lawyer cannot accept a nonrefundable fee, or characterize a fee as nonrefundable, unless the lawyer complies with the following conditions:

(1) The lawyer confirms to the client in writing before or within a reasonable time after commencing representation (a) that the funds will not be refundable and (b) the scope of availability and/or services the client is entitled to receive in exchange for the nonrefundable fee;

(2) A lawyer shall not solicit or make any agreement with a client that prospectively waives the client's right to challenge the reasonableness of a nonrefundable fee, except that a lawyer can enter into an agreement with a client that resolves an existing dispute over the reasonableness of a nonrefundable fee, if the client is separately represented or if the lawyer advises the client in writing of the desirability of seeking independent counsel and the client is given a reasonable opportunity to seek such independent counsel.

(3) Where it accurately reflects the terms of the parties' agreement, and where such an arrangement is reasonable under all of the relevant circumstances and otherwise complies with this Rule, a fee agreement may describe a fee as "nonrefundable," "earned on receipt," a "guaranteed minimum," or other similar description indicating that the funds will be deemed earned regardless whether the client terminates the representation.

(i) A nonrefundable fee that complies with the requirements of (h)(l)-(2) above constitutes property of the lawyer that should not be commingled with client funds in the lawyer's trust account. Any funds received in advance of rendering services that do not meet the requirements of (h)(l)-(3) constitute an advance that must be deposited in the lawyer's trust account in accordance with Rule l.l5(b)(1) until such funds are earned by rendering services.

(j) For definitions of "advance," "retainer," and "nonrefundable fee" as used in this Rule, see the definitions in Rule 1.0.

clause written in plain language that sets forth the circumstances under which such fee may be incurred and how it will be calculated. Under New York's rule it appears that even the use of the term "nonrefundable retainer" would violate the rule.

Ohio's Rule 1.5(d) (like Arizona's) prohibits fees denominated as earned upon receipt, non-refundable or other similar terms unless the client is simultaneously advised in writing that the client may discharge the lawyer at any time and be entitled to return of that is reasonable under the rule.

Oregon Rule 1.5 (c) prohibits a fee designated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that the funds will not be deposited in a trust account and the client will be entitled to a refund if services for which the fee was paid were not completed.

South Carolina's Rule 1.5(f), which does not contain the term "non-refundable, does permit a lawyer to charge an "advance" fee to be treated as "immediately earned" if there is an agreement in writing between the lawyer and client which explains, among other things, that the fee will not be held in a trust account to be withdrawn as earned, the client has a right to terminate the representation and "may be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided." [138] South Carolina differs from the MR 1.15(c), in the same way as New York, in that it does not require that all fees paid in advance for services to be rendered in the future to be held in a trust account, except that in South Carolina the client must consent.

Tennessee Rule 1.5(f), which is stated in general terms, seems to permit the denomination of a fee as non-refundable "in whole or in part" as long as there is agreement by the client in a writing "signed by the client, that explains the intent of the parties as to the nature and amount of the nonrefundable fee." [139]

Washington's Rule 1.5(f) does not expressly refer to non-refundable retainers, however, Rule 1.5(f)(1) permits a lawyer to characterize an advance fee as earned upon receipt where the fee is paid to secure the lawyer's availability to provide legal services separate and apart from compensation for actual services to be performed. Under Rule 1.5(f)(1), which requires a writing signed by the client, availability fees would be deemed the lawyer's property and they may not be placed in the lawyer's trust account. Rule 1.5(f)(2) permits a lawyer to charge a flat fee to cover the cost of all or part of legal services to be provided in the future and by agreement in writing a form of which is included in the rule, such funds may be deemed the lawyer's property and shall not be placed on a trust account.[140] Lawyers who are subject to Washington Rules of Professional Responsibility should refer to the extensive Comments to Rule 1.5(f), ¶¶ 12-16.

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[138] Comment 10 to S.C. Rule 1.5 states that "language describing such arrangements varies, and includes terms such as flat fee, fixed fee, earned on receipt, or nonrefundable retainer, but all such fees are subject to refund if the lawyer fails to perform the agreed-upon legal services."

[139] See Tennessee Bar Association Posting on Proper Billing Practices available at http://www.tba.org/solo-practice/how-to-bill-for-your-services; see also Tennessee Ethics Opinion 92-F-128(a) which permits advance non-refundable in certain instances; "to compensate the lawyer for being available to represent the client; to compensate for committing time for representation precluding acceptance of other employment; and, to compensate for being conflicted out of accepting adverse employment."

[140] Washington Rule 1. 5(f) provides that "[f]ees and expenses paid in advance of performance of services shall comply with Rule 1.15A, subject to the following exceptions:

(1) A lawyer may charge a retainer, which is a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer's property on receipt and shall not be placed in the lawyer's trust account.

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following:

(i) the scope of the services to be provided;

(ii) the total amount of the fee and the terms of payment;

Florida's Rule 4-1.5(e) permits fees denominated as nonrefundable as long as they are confirmed in a writing which explains "the intent of the parties as to the nature and amount of the nonrefundable fee." However, such fees still must be reasonable as provided by the rule "without regard to their characterization by the parties." Presumably, an unearned fee that is not returned would be deemed unreasonable under Florida's rule. [141] Florida's rule also defines three types of fees: a "retainer," as neither payment for past nor future services but to guarantee the lawyer's future availability; a "flat fee" as a sum of money paid for all legal services to be provided in the representation which may be denominated as "nonrefundable," and an "advance fee" as a sum of money paid to the lawyer to be billed as the legal services are provided."

Minnesota's Rule 1.5(b)(3)[142] prohibits the use of the terms "nonrefundable" or "earned upon receipt" in a lawyer's fee agreement. Dealing primarily with the subject of safeguarding advance payments under Rule 1.15, except as provided in the rule which requires, among other things, agreement in writing, advance payments will be presumed to be unearned and therefore held in a trust account. To the degree that the lawyer and client agree that the advance payment is the property of the lawyer, such agreements must provide, among other things, that the client has a right to terminate the representation and that "the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided." Even in cases in which a fee is arguably deemed earned upon receipt and therefore non-refundable, the fee must still be reasonable. Under such circumstances the "availability fee" may be considered to be the lawyer's property upon payment of the fee, but it would still be subject to refund in whole or in part if the lawyer is not available as promised.

(iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account;

(iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and

(v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. [form of agreement omitted].

[141] See Florida Bar Opinion 93-2 (1993) ("If the lawyer performs no legal services, obtains no benefits for the client, and has not lost other employment opportunities as a result of agreeing to represent the client, we believe the lawyer might well be guilty of charging an excessive fee if no part of it was refunded.")

[142] Minnesota Rule 1.5(b)(3) provides as follows:

Except as provided below, fee payments received by a lawyer before legal services have been rendered are presumed to be unearned and shall be held in a trust account pursuant to Rule 1.15.

(1) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and may be paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a written fee agreement signed by the client, a flat fee shall be considered to be the lawyer's property upon payment of the fee, subject to refund as described in Rule 1.5(b)(3). Such a written fee agreement shall notify the client:

(i) of the nature and scope of the services to be provided;

(ii) of the total amount of the fee and the terms of payment;

(iii) that the fee will not be held in a trust account until earned;

(iv) that the client has the right to terminate the client-lawyer relationship; and

(v) that the client will be entitled to a refund of all or a portion of the fee if the agreed-upon legal services are not provided.

(2) A lawyer may charge a fee to ensure the lawyer's availability to the client during a specified period or on a specified matter in addition to and apart from any compensation for legal services performed. Such an availability fee shall be reasonable in amount and communicated in a writing signed by the client. The writing shall clearly state that the fee is for availability only and that fees for legal services will be charged separately. An availability fee may be considered to be the lawyer's property upon payment of the fee, subject to refund in whole or in part should the lawyer not be available as promised.

(3) Fee agreements may not describe any fee as nonrefundable or earned upon receipt but may describe the advance fee payment as the lawyer's property subject to refund. Whenever a client has paid a flat fee or an availability fee pursuant to Rule 1.5(b)(1) or (2) and the lawyer-client relationship is terminated before the fee is fully earned, the lawyer shall refund to the client the unearned portion of the fee. If a client disputes the amount of the fee that has been earned, the lawyer shall take reasonable and prompt action to resolve the dispute.

Interaction between MR 1.5(a) (reasonableness), MR 1.5(b) (modifications of fee agreement) and MR 1.8(a) (business transactions with client)

As discussed, lawyers who need to modify or renegotiate fundamental terms of a fee agreement must still comply with MR 1.5, in that the fee charged or collected as a result of the changed fee agreement must be reasonable and the lawyer must provide the client with sufficient notice and information about any proposed changes so that the client may make an informed decision. Because any such modification in the fee agreement by definition occurs after the lawyer-client relationship has been established, as noted in Comment 4 to MR 1.5, lawyers must also consider the requirements of MR 1.8 concerning business transactions with clients.[143]

MR 1.8(a) requires that such transactions be subject to certain client protections, among them that the transaction be "fair and reasonable," that the client is advised to and given the opportunity to consult with independent counsel and that client gives informed consent in writing.[144] As noted in Comment 1 to MR 1.8, while fee agreements are not ordinarily deemed business transactions with clients, MR 1.8 applies when a lawyer accepts an interest in the client's business in lieu of a cash payment of the fee.[145] MR 1.8 has also been held to apply to cases involving a modification or re-negotiation of a previously agreed upon fee agreement, based on the inherent conflict of interest arising from the lawyer-client relationship that was established by the original agreement.[146]

Accordingly, lawyers who seek to modify an existing fee agreement must be careful to comply with both MR 1.5 and MR 1.8(a).

We reiterate the need for immigration lawyers to be familiar with the applicable professional responsibility rules for the state where they are admitted, as well as the state where they provide legal services in an immigration matter.

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[143] Comment 4 to MR 1.5 states in pertinent part as follows:

A lawyer may accept property in payment for services….[h]owever, a fee paid in property instead of money may be subject to the requirements of Rule 1.8(a) because such fees often have the essential qualities of a business transaction with the client.

[144] MR 1.8(a) provides as follows:

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest averse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

[145] Comment 1 to MR 1.8 (the rule "does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee") See also ABA Formal Ethics Op. 02-427 (2002), "Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee."

[146] See, e.g., Matter of Weissman, 30 Mass. Att'y Disc. R ___(2014)(available at http://www.mass.gov/obcbbo/bd14-003.pdf) (lawyer's alleged renegotiation of fee agreement to permit lawyer to treat $25,000 monthly fee payments against hours worked as earned on receipt, contrary to original agreement, deemed an impermissible business transaction with client in violation of Rule 1.8(a)); In re Hefron, Ind. No.98500-0006-DI-390 (Jul 7, 2002)(lawyer who pressured client into changing oral per-hour fee agreement to a contingent fee arrangement after, unbeknownst to client, opposing counsel made favorable settlement offer, deemed to have lawyer attempted to collect an unreasonable fee in violation of Rule 1.5(a) and improperly renegotiated fee agreement without client protections in violation of Rule 1.8(a)).

D. Hypotheticals

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: Your Time is My Time – My Time is Your Time (Removal Case)

Paula is an experienced immigration lawyer who practices removal defense. Because her cases tend to be unpredictable, she charges hourly for her work. She uses a written retainer agreement that explains the work to be done, the hourly rate for her services and those of any paralegals, and that fees will be kept in a trust account to be withdrawn as earned. She keeps her fees down by using paralegals for routine drafting and fact gathering. She keeps close track of all time spent on the client's behalf and sends invoices monthly with detailed time entries. Paula provides an estimate of the total fee and usually requests an initial retainer upfront.

Paula frequently appears at master calendar hearings and bills her clients for the time she spends waiting for the hearing and in court. She often has master hearings for more than one client scheduled on the same day, and makes it a practice to get to court about an hour early to schedule her clients' appearances one after the other to be more efficient. The hearings may take as little as ten minutes, but her practice of appearing early reduces the waiting time for her clients. She appears an hour early whether she has one client or more, since that is about how long the scheduling process takes. On the days that she has only one master hearing she bills the client for her time in court. On the days she has more than one hearing, she still bills each client one full hour for the same time she spends waiting for the hearing to start after appearing early to get each case on the calendar early.

This scenario concerns what may be deemed an unreasonable fee based on the fact that the lawyer may be billing one client for time actually spent on another client's matter.

Analysis

Does Paula's method of billing her time comply with MR 1.5(a)'s requirement that a lawyer must not charge or collect an "unreasonable fee"?

No.

Although none of the factors listed in MR 1.5(a) directly address the issue of double billing, Paula's practice of essentially double or triple billing for the same amount of time is unreasonable. Paula might argue in her defense that by scheduling the master hearings back-to-back, Paula may be saving her clients from having to pay for waiting time. If so, this is something Paula should discuss with her clients when communicating the terms of the fee agreement. Without prior agreement, Paula's billing practice could result in a fee dispute between the clients who were double or triple billed and Paula, and she would not be able to meet her burden of proving that she spent the one-hour solely for one client. Additionally, Paula might be subject to a charge of misrepresentation in that Paula is giving the false impression that she is spending the one hour only for the one client.

Does Paula's retainer agreement comply with MR 1.5(b)'s requirement that a lawyer communicate the scope of representation and the basis or rate of the fee?

Maybe.

Paula has complied in that she has stated in her written retainer agreement the hourly rate at which she will charge her clients for her time. An argument could be made, however, that since Paula has a regular practice of charging each client the full one-hour for the pre-hearing scheduling whether it is for one client or three, she should explain that practice in the retainer agreement. Some clients might be comfortable with that practice and if they consented, Paula would be able to make the argument that the charge was reasonable.

Hypothetical Two: It's Your Problem, Not Mine (Labor Certification Case)

John was hired to represent E-Image, Inc. (the company) and its foreign national Indian born employee, Prasad, in filing a labor certification application so that Prasad may become a permanent resident. The company, which is required to pay the fee, agreed to pay John (attorney) an advance flat fee for filing the labor certification application. John advised E-Image that the advance fee would be held in a trust account (as would be normally required under MR 1.15(c)) and that the fee would be subject to a refund if the agreed upon legal services are not provided (as might be required under Rule 1.16(d)). He does not advise the company that he will withdraw funds from the deposited flat fee as earned. The agreement is in writing.

The long-term goal is for Prasad to become a permanent resident, but both the company and Prasad understand that the waiting time will be years under the current visa backlog. However, Prasad also has an issue with his H-1B status. Because he has already completed more than four years and seven months of H-1B time, he will soon reach the six-year limit of time allowed in H-1B status. Prasad will qualify for a limited extension of his H-1B time beyond the six-year limit while pursuing permanent residence only if the company files his labor certification application before he reaches his last year of H-1B time. Under the circumstances, the labor certification must be filed within five months.

John immediately starts working with the company, gathering required information and documents to complete the labor certification application for filing on Prasad's behalf within one month before the deadline for the H-1B extension. During the course of his work, John withdraws approximately three-quarters of the fee on the basis of the work he has performed, but he does not inform the company. Shortly before John is ready to file the labor certification application, the company realizes it needs to re-do its internal posting because the salary amount provided is wrong. As a result, John will not be able to have the labor certification application ready for filing until two weeks after the one-year deadline before the six-year limit for the H-1B extension. When Prasad learns this, he is bitterly disappointed about missing this deadline and he quits. The labor certification application is not filed.

Since the labor certification process has been aborted because Prasad quit, the company demands a refund.

This scenario concerns the circumstances under which the failure to provide a refund of an advance fee may be deemed the charging or collecting of an unreasonable fee.

Analysis

Does John's fee agreement comply with MR 1.5 (b)?

Yes, but…

John's fee agreement complies in that he has advised the company of the amount of the flat fee and identified the scope of the work to be performed, i.e., here not only to prepare the labor certification application, but as agreed informally to file it within a time certain to allow Prasad to qualify for the limited extension of his H-1B status. Although John has advised the company that the money will be held in a trust account, he has not made clear in the agreement that he would be withdrawing funds as earned. Generally, this would be understood, but better practice would have been for John to advise the company about that as well.

Further, although John has indicated that the company may be entitled to a refund, better practice would have been for John to indicate how the refund would be determined, e.g., calculated on an hourly rate or a set fee for various stages/preparation of documents.

In addition, because there are other potential ethical issues in employment-based permanent residency cases, in particular dual-representation, John should have had a more comprehensive fee/retainer agreement. Lastly, while MR 1.5(b) does not require a written agreement, John took the better course by using one.

How must John handle any remaining fees in his trust account, once E-image demands a refund?

Carefully.

Although not addressed in MR 1.5, MR 1.15(e) requires that when there is a dispute as to entitlement of funds in the lawyer's trust account that the amount in dispute be held in trust until the dispute is resolved. John would likely be deemed to have violated MR 1.15(e) if he withdrew the remaining funds after E-image demanded a refund.

Is E-image entitled to a full refund?

Almost certainly no.

While MR 1.5 does not expressly address the issue of fee refunds, a lawyer who fails to return any part of an advance fee that has not been earned would likely be deemed to be charging or collecting an "unreasonable fee" in violation of MR 1.5(a). However, here John did all the work necessary to prepare the labor certification and he completed the work by a time certain as promised. It is not his fault that the company provided incorrect information that delayed the process. John is also not responsible for the fact that Prasad quit. Indeed, there is always the possibility that an employee-beneficiary of labor certification process may choose to leave or be terminated by the employer. That is the risk that the employer takes when retaining the lawyer in the first place. Since John performed all of the legal work, short of the actual filing, E-image should not be entitled to a full refund.

Is E-image entitled to a partial refund?

Most likely no.

E-image would be entitled to a partial refund only for any work that John had not completed and for any filing fees paid in advance. There is no black letter rule that indicates how a lawyer should calculate what portion of the flat fee that has not been earned. For this reason, lawyers who charge on a flat fee basis should make efforts to keep a somewhat contemporaneous record of spent time for work performed. Obviously, estimates of hours spent that are prepared only after the issue of a refund arises have less evidentiary weight. Another method might be for John to have some kind of fixed fee for different stages of the representation. Under the circumstances here, since John had already prepared all of the necessary papers for filing, he would be justified in asserting that E-image is only entitled to a nominal refund to cover the time spent for the actual filing and any filing fees paid in advance.

Hypothetical Three: I Don't Know What I'm Doing, But You Can Pay Me to Learn (U Visa)

Stanley, fresh out of law school, decided to open an office the day after he received his bar license in a neighborhood where the primary language spoken is Spanish. He had decided to practice immigration law after attending a one-hour seminar about pro bono work in immigration matters. Two days after he opened his office, Veronica, from El Salvador, hired Stanley to represent her in a U visa matter. Stanley had no experience preparing U visas. Anticipating he would have to devote much more time than an experienced immigration lawyer to learn the law and procedures, Stanley decided to err on the high side and charge Veronica a $10,000 flat fee. Veronica, who could not speak or read English well, signed the retainer agreement Stanley had drafted (in English). The agreement provided as follows:

> I, Veronica, promise to pay Stanley a $10,000 flat fee, which is nonrefundable, for my immigration case. Attorney hopes for a good result and will work hard. Attorney will charge for all out of pocket expenses. No refund will be given since this is a flat fee case and agreed upon by the parties.

Veronica paid the $10,000 fee which Stanley promptly deposited into his operations account since he considered the funds as earned upon receipt and had also asserted the funds were not-subject to a refund. Stanley started to do general internet research on the requirements of a U visa and what forms to use, but even after doing this work for a few days, he did not feel confident enough to schedule any meetings with Veronica to start preparing the forms. He also did not have the time because, in order to earn some regular income, he had taken a position teaching paralegals. After failed attempts to speak with Stanley about her case or schedule a meeting, Veronica quickly became frustrated with Stanley, and terminated the representation demanding a full refund. Realizing that he was more interested in teaching than practicing law, Stanley decided to close down his "practice." Stanley did not have any money for a refund since he had withdrawn the $10,000 fee to pay off his

school loans and other expenses. In response to Veronica's demand, he relied on the agreement terms that the fee was nonrefundable and refused to make a refund.

This scenario concerns the factors to be considered in determining whether a lawyer has charged or collected an unreasonable fee and the requirements of any fee/retainer agreement used by the lawyer.

Analysis

Does Stanley's $10,000 flat fee comply with MR 1.5(a) which prohibits a lawyer from charging or collecting an "unreasonable" fee?

No. First, by his own calculation Stanley based the $10,000 flat fee on the assumption that he would have to put in many more hours to learn the law and procedures in obtaining a U visa than a more experienced immigration lawyer. In effect, Stanley was getting Veronica to pay him to attain competence in U visa matters which would benefit him well beyond the fee itself, with no additional benefit to Veronica. In addition, because Stanley was unable to return the fee (because he used the funds) and also claimed that the fee was non-refundable, the fee would be deemed unreasonable on that basis alone. At the time Veronica terminated the representation, he had not done any significant work. Thus, most of the fee paid was unearned. Since MR 1.16(d) requires a lawyer to return any advance unearned fees and Stanley did not do so, the fee would be deemed unreasonable on that basis also.

Consideration of the relevant factors listed in MR 1.5(a) also supports the conclusion that the fee is unreasonable. There are no indications here that Veronica's U visa was particularly complicated. Moreover, Stanley can in no way hold himself out as a highly reputable immigration lawyer who may be justified in charging a higher fee. He certainly should not be entitled to charge more than the fee customarily charged in the locality for similar services when the flat fee range for U visas charged by reputable lawyers in his locality was substantially less than $10,000.

Does Stanley's fee agreement comply with MR 1.5(b) which requires that a lawyer explain the scope of the representation and the rate or basis of the fee?

No. Stanley's fee agreement does not, in any way, describe the scope of the services to be performed. The use of the phrase "immigration case" without being defined more clearly does not comport with the letter or spirit of MR 1.5(b). In addition, since MR 1.5(b) involves communication about the representation, MR 1.4(b) (requiring that a lawyer explain matters to permit the client to make informed decisions) is also implicated. Here, the fee agreement not only failed to include sufficient information about the representation, but in particular failed to provide an explanation of how Stanley would handle the funds and why they were deemed non-refundable. Most importantly, because Veronica could not read or speak English well, Stanley should have prepared the agreement in a language that Veronica could understand or have a non-interested party read the agreement to Veronica in her language and obtain a written acknowledgment from Veronica. The failure to do either implicitly amounts to a violation of MR 1.5(b) since it is based on "communication" which presumes a back-and-forth discussion.

Was Stanley's decision to deposit the $10,000 fee into his operating account proper under the circumstances? Does the fact that Stanley is no longer in possession of Veronica's advance fee payment affect his obligation to refund the fee?

No. MR 1.15(c) requires that advance fees be placed in a lawyer's trust account and withdrawn as earned. Although Stanley characterized the fee as "non-refundable," it was essentially an advance payment for services to be rendered and not a fee that was earned on receipt. As such, he was required to place the funds in a trust account and prohibited from withdrawing any funds until the fee was actually earned. Stanley's obligation to return any unearned funds survives whether or not he used the funds for personal expenses.

Had Stanley placed the funds in the trust account as required, he would not have been permitted to withdraw the funds before he had actually earned the fee. Lawyers who withdraw unearned fees from a trust account may be subject to a charge of conversion.

Hypothetical Four: Transparency and Diligence—No Rule Violations and No Refund (Removal Case)

Frank had a well-established immigration law practice in Washington State, where he is also admitted. Tara, a client from Canada, hired Frank to represent her in removal proceedings. Frank executed a contract for a flat fee of $5,000 for removal proceedings that contained the following language:

In accordance with Washington RPC 1.5 (f)(2),[147] *Lawyer agrees to provide, for a flat fee of $5,000.00, the following services:*

Removal proceedings in the Seattle Immigration Court. These proceedings include two Master Calendar Hearings, one Individual Calendar and one form of relief (Non-LPR Cancellation of Removal). If circumstances result in the matter requiring more services, such as a motion to re-open or appeal, Lawyer and Client agree that additional fees may be charged.

The flat fee shall be paid as follows: $5,000.00 due at signing.

Upon Lawyer's receipt of all or any portion of the flat fee, the funds are the property of Lawyer and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have a right to a refund of a portion of the fee.

Upon receipt of the $5,000.00, Frank deposited the fee into his operations account and depleted those funds for business expenses and disbursements to his personal bank account.

Frank worked very diligently and hard on Tara's case. He spent over 100 hours in preparation and completed all required tasks. His time, even if billed at what might be deemed a very low hourly rate of $75 per hour, far exceeded the $5000 flat fee.

Tara was a very demanding and an uncooperative client. She frequently failed to give Frank the documents he needed or provide information necessary for her case. Because of Tara's delays, the Master Calendar hearings were rescheduled three times, causing Frank to go to court several more times than agreed upon in the contract. At mid-point of her Individual Hearing, which involved extensive cross-examination of Tara and several witnesses, Tara threw up her hands and stormed out of courtroom. The Immigration Judge ordered her removed despite Frank's efforts to obtain a continuance.

Five months later, Tara sent Frank a letter from Canada demanding a full refund of her $5000.00. Frank refused on the basis that he had completed all the work he had agreed to provide, including extra work for which Tara had not been billed. Further, he pointed out to Tara that the adverse result in her case was due to her behavior at the Individual Hearing and overall failure to cooperate with him.

Tara then promptly filed a bar complaint demanding that the bar assist her in getting the money back.

This scenario addresses the importance of the terms of a fee/retainer agreement when the client demands a refund and files a bar complaint to pressure the lawyer to comply with that demand. It also addresses the reality that many states have adopted modified versions of MR 1.5. Obviously, the lawyer's first task in determining the ethical standards by which a lawyer must practice is to check the applicable state rule. Here, Washington Rule 1.5

[147] Washington Rule 1.5 varies from MR 1.5. Washington Rule 1.5(f) provides in pertinent part:

(2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. [form of agreement omitted]

differs from MR 1.5, in part, by the addition of sub-section (f)(2) which not only expressly permits a lawyer to obtain a waiver of the advance fee trust account requirement, but also provides specific provisions to be included in a required written agreement containing such waiver. Washington's Rule 1.5(a) prohibiting unreasonable fees is essentially the same as MR 1.5(a).

Analysis

What should Frank know about how complaints concerning unreasonable/excessive fees or refund demands are handled by his bar committee?

Preparation! Preparation! Preparation!

Assuming that Frank determines initially to handle Tara's complaint on his own (rather than engaging counsel), he should familiarize himself with the bar committee's policies concerning what are commonly called fee disputes. Some bar committees, for example, refer such complaints to mediation or other alternate dispute resolution programs which seek to resolve such disputes without reference to the rules of professional responsibility. If such programs exist, a bar committee might temporality close the matter or otherwise dismiss the complaint as a fee dispute beyond the jurisdiction of the bar committee.

However, if the bar committee for Frank's jurisdiction determines to go forward with an investigation of Tara's complaint in the normal course, Frank likely would be required to provide a written response. Assuming Frank refused to provide a refund, he would need to provide an explanation, supported with relevant documentation or other evidence, of the work he performed and any other information to support his position that Tara was not entitled to a refund. Generally, absent a showing that a lawyer's representation was not competent or diligent (or violated any other non-fee related rule) complaints which simply amount to a demand for a refund would be deemed a fee dispute not subject to the rules of professional responsibility.

Did Lawyer Frank's retainer agreement comply with Washington State's RPC 1.5 (f)(2) concerning advance fees?

Yes. His contract contained all of the required elements for a flat fee agreement. In particular, the agreement provided sufficient notice to Tara that the fee would be deemed earned on receipt, but in any event that she still might be entitled to a refund.

Did Lawyer Frank's refusal to return any portion of the $5,000 flat fee amount to the charging or collecting of an unreasonable fee under either Washington's version of Rule 1.5(a)? MR 1.5(a)?

No, and no. Here the facts demonstrate that Frank performed all of the services delineated in his retainer agreement and more so. Even if it were disputed that Tara failed to cooperate, there is no evidence that Frank failed to provide the services for which Tara paid him. An adverse result, without more, is not a basis for a refund. Here, since Tara refused to participate fully in the hearing by walking out of the courtroom, the adverse result cannot be attributed to Frank, especially given that he argued for a continuance.

Hypothetical Five: Let's Call the Whole Thing Off (H-1B Problem USCIS Flip-Flop)

Philip is an experienced immigration lawyer practicing in Oregon, where he is also admitted. He has handled many Employment-Based Adjustment of Status (AOS) cases. He charges on a flat fixed or hourly fee basis. His hourly rate is $275.

Philip uses a written fee agreement that describes the legal services that Philip will provide and his hourly rate. When the rate is hourly, Philip provides an estimate of the time needed to perform the necessary services. In flat fee cases, he states the exact amount of the fee.

When the case involves the filing of an application, Philip requires that half of the fee, whether flat or the hourly estimate, be paid in advance before any work is done and that the remaining portion be paid no later than one week before the filing of the application.

Philip's fee agreement is silent as to into what type of bank account the advance fee payment will be deposited, i.e., Philip's "Lawyer Trust Account" or his "General Operating Account." As a general matter Philip deposits all fee payments directly into his general operating account on the basis that he can treat these payments as his own, earned on receipt, as soon as he receives them from the client.

The fee agreement includes a clause stating that Philip does not guarantee success, but does state that Philip will exercise his best efforts to obtain the result for which he has been hired.

The agreement states that either party may terminate the agreement upon written notice of termination to the other party. However, the agreement is silent as to whether any advance funds paid for legal services will be refunded if the representation is terminated.

In late July 2015, Philip was retained by Ramesh who was born in India to handle an Adjustment of Status (AOS) application. Ramesh was the beneficiary of an approved EB-2 I-140 petition and had learned, according to the August 2015 Visa Bulletin, that his priority date was likely to become current within a few months.

Ramesh agreed to pay Philip a flat fee of $3,000 to prepare and file the AOS application. Philip was so sure that this was a "clean" case that he did not discuss with Ramesh the possibility that USCIS might schedule Ramesh for an interview or issue a request for evidence (RFE), which might require additional services and fees. The relatively low amount of the fee reflected Philip's optimism for an easy successful result. Per the agreement Ramesh paid $1,500 upon signing and Philip deposited the funds in his operating account.

On September 9, the October Visa 2015 bulletin reported that EB-visa numbers for India would be available for Ramesh's priority date. That same day, Philip advised Ramesh that it was time to move into high gear without a moment's delay. Philip instructed Ramesh to get an Immigration medical exam and he immediately started to gather Ramesh's biographic data and documents to ensure that a "RFE proof" I-485 could be filed with USCIS on October 1, 2015, the earliest date it could be filed. Ramesh promptly followed Philip's instructions to the letter.

Over the next two weeks, Philip spent many hours preparing Ramesh's case and he felt justified in asking Ramesh to pay the balance of the fee to ensure that the total amount had been paid before the filing. Ramesh paid the balance. Philip finalized the AOS with the intention of filing it on October 1, 2015.

To Philip's (and many other immigration lawyers) surprise, on September 25, 2015 USCIS issued a revised October Visa Bulletin which changed the calculation for visa availability. The result was that visas would not be available for Ramesh's priority date as expected. USCIS would not now accept Ramesh's AOS on October 1, 2015, and even worse, it appeared that Ramesh would have to wait years before he would be able to file an Adjustment of Status application. In addition, by the time visa numbers became available for Ramesh's priority date, the AOS application that Philip had prepared would be out-of-date and Philip would have to prepare a new one.

Ramesh learned about this terrible news from the Internet and several friends who found themselves in the same predicament. Many were dismissing their lawyers on the basis of "incompetence." Ramesh was also very upset and sent Philip an email stating that, at least for now, he was terminating his relationship with Philip. He stated that he would use Philip's services at a future date, when a visa number became available for his case. However, since he had "nothing to show for the money" he wanted a full refund. Ramesh advised Philip he would stop by the office the next day to get the money.

Analysis

Does Philip's standard fee/retainer agreement comply with the requirements in Oregon's RPC 1.5(c)(3)? [148] MR 1.5(b) or MR 1.15?

[148] ORPC 1.5 (c)(3) provides that a law may not charge or collect:

a fee denominated as "earned on receipt," "nonrefundable" or in similar terms unless it is pursuant to a written agreement signed by the client which explains that:

Clearly no as to ORPC 1.5(c)(3).

Philip's agreement does not advise the client that the advance flat fee payments will not be deposited in a trust account or that Philip will treat the funds as earned on receipt as is required under Oregon's version of MR 1.5. The agreement's silence as to whether the money will be safeguarded to be withdrawn as earned or deemed the lawyer's property to be withdrawn as the lawyer chooses violates Oregon's Rule.

Philip's agreement also violates MR 1.15(c) which requires that advance fees must be placed in a trust account to be withdrawn as earned. It is arguable that Philip's agreement complies with MR 1.5(b) concerning adequate communication of the scope of representation, since Philip did not communicate the possibility of a change in the basis or rate of the fee.

Variation (A): Assuming the same facts above, except that Philip's fee is based on an hourly rate of $275, would Philip's fee/retainer agreement comply with the requirements in Oregon's RPC 1.5(c)(3)? MR 1.5?

Still clearly no.

Philip is still taking an advance fee payment of $1,500 to cover the first half of the estimated total fee of $3,000 based on his hourly rate of $275. At the time that payment is made, it is still an advance fee. That it is calculated on the basis of an hourly estimate makes no difference.

Variation (B): Assuming that Philip's fee agreement complied with ORPC 1.5(c) in that it provided that the advance fees (either flat fee or hourly based) would not be held in a lawyer's trust account, that the client could discharge Philip and if so might be entitled to a refund of the fees paid for the services that were not completed, would Philip be required to include an explanation of how he would determine the amount of any refund?

Most likely, no.

Under the plain language of ORPC, the applicable rule, such explanation is not required. However, it would be better practice to provide some explanation especially in a flat fee arrangement. Presumably, if the fee is to be calculated on an hourly basis, Philip would be required to keep a record of his time and it would be easier to calculate the amount to be refunded. When it is a flat fee, better practice would be to provide some type of breakdown as to the task performed and the portion of the flat fee that corresponds to completion of that task. These are sometimes referred to as "benchmarks" or "milestones."[149]

Is Ramesh entitled to a refund?

Not much, if any.

Irrespective of whether Philip's fee agreement complied with the applicable rules, to the degree that Philip had not yet completed the work for which he was paid, Philip would be required to return whatever portion of the fee that could be attributed to work not performed – in other words, an unearned fee. An unearned fee that was not returned would be deemed "excessive" under Oregon's Rule 1.5(a) or "unreasonable" under MR 1.5(a).

In the case of the flat fee arrangement, as was the case here, it is not likely that Ramesh would be entitled to any refund, Philip had completed the work for the AOS by the time Ramesh demanded the refund and had done so on an expedited basis. Philip might be required to place a value for the administrative work associated with the actual filing of the AOS, which did not take place, and the filing fee, if the flat fee was designed to include it.

In the case of the hourly fee arrangement, if Philip did not put in the approximate eleven hours of work ($275 x 11 hours= $3025) to complete the AOS application by the time Ramesh demanded a refund, he would only be required to return funds for the unearned time at the hourly rate. The failure to return such funds based on an

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(i) the funds will not be deposited into the lawyer trust account, and

(ii) the client may discharge the lawyer at any time and in that event may be entitled to a refund of all or part of the fee if the services for which the fee was paid are not completed.

[149] See n.135 supra.

hourly rate would, as in the case of any non-refunded advance flat fee, also be deemed an excessive or unreasonable fee.

As a matter of good business practice, however, Philip might want to give Ramesh a partial refund as a courtesy since Ramesh had been cooperative, acted in good faith and it was not his fault that a change in USCIS calculations rendered the AOS filing futile. Alternatively, Philip could promise, preferably in writing, to waive or charge Ramesh a reduced fee for the filing of the AOS application at the appropriate time in the future. Either way, Philip would be more likely to keep Ramesh as a client.

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Craig Dobson

Maya Bangudi

Michele Carney

Reid Trautz

Maheen Taqui

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American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.6
Duty of Confidentiality

Sherry K. Cohen, Reporter

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MODEL RULE 1.6 DUTY OF CONFIDENTIALITY

Introduction

Most people who decide to consult with or hire a lawyer to help with a legal problem understand the special relationship between a client and a lawyer. They rely on the basic concept that a client must be able to speak freely with the lawyer without worrying that the lawyer will reveal information harmful to the client. The client presumes that the lawyer has a duty of loyalty to him, as well, that requires the lawyer to provide the best representation possible by, among other things, keeping the client informed of all information necessary to assist the client in making informed decisions about the representation.[1] The client's trust in a confidential lawyer-client relationship also allows the lawyer to advise the client appropriately and help the client achieve the purpose of the representation in the first instance. In the immigration context, in particular, a foreign national may be afraid to disclose harmful information without the lawyer's assurance that he will hold such information confidential. This would be unfortunate situation because the consequences to the immigration client who is not frank with his lawyer can lead to outright denial of the relief sought, deportation or other irreparable impediments to any future related immigration matter. It is important for clients to be able to rely on the principle of confidentiality.

There also may be adverse consequences to the immigration lawyer if she makes an unauthorized disclosure of confidential information. While many prudent and conscientious immigration lawyers believe they understand the ground rules of handling confidential information, the risk of unintentional disclosure is significant if the lawyer simply relies on what he remembers from law school or instinct.

Model Rule 1.6, read together with the accompanying ABA comments, provides the necessary framework for handling client information.[2] The rule sets forth the nature of information to which the duty of confidentiality applies, prohibits disclosure of confidential information absent client consent or implied authorization, and lists limited exceptions *that permit, but do not require*, disclosure of confidential information.[3]

Other Model Rules address the duty of confidentiality to prospective and former clients, and the proscription against the *use* of confidential information to the client's disadvantage, even if the lawyer never discloses the information. [*See* MR 1.18(a) and (b), MR 1.9(c)][4] The duty of confidentiality is also implicated under MR 1.7 (prohibiting representation of concurrent (or multiple) clients whose interests

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[1] As discussed more fully later in this chapter, the lawyer's duty of loyalty is fundamental to the lawyer's relationship with his client.

[2] The EOIR/DHS grounds for discipline set forth in 8 CFR §1003.102 do not include a parallel duty of confidentiality to the client for lawyers.

[3] MR 1.6 concerns prohibited and permitted disclosure only. There are circumstances in which a lawyer may be *required* to disclose confidential information. For example, under MR 3.3, in matters before a tribunal, a lawyer may be required to disclose information otherwise protected under MR 1.6. *See* Rule 3.3 in this Compendium. MR 4.1 (b) may require disclosure to avoid assisting a criminal or fraudulent act by the client, unless prohibited by Rule 1.6. In addition, there are state and federal mandatory reporting acts, *e.g.*, child abuse, which may require disclosing certain client confidences. (See discussion of mandatory reporting of child abuse in discussion of Rule 1.6(b)(6).

[4] MR 1.18(a) (defining prospective client as "A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.) MR 1.18(b) provides that a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."

MR 1.9(c) provides that a "lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

are adverse) in cases involving what has been termed "dual representation" in immigration matters.[5] In addition, an immigration lawyer representing a client with diminished capacity, such as a minor, whom the lawyer reasonably believes is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interests, may take reasonably necessary protective action, including revealing confidential information to others who have the ability to protect the client, including seeking the appointment of a guardian ad litem. (See MR 1.14)

The affirmative duty to take reasonable efforts to avoid inadvertent disclosure set forth in Rule 1.6(c) more specifically articulates the general duty of competence under MR 1.1 as to client information. MR 1.6(c) is particularly relevant as lawyers and their clients rely on the Internet and other electronic technology in the representation. A lawyer's claim of not being technically savvy because of advanced age or limited financial resources can no longer justify the failure to take proper measures to protect client information that is transmitted or stored electronically. Indeed, Comment 8 to MR 1.1 could not be clearer in advising lawyers that competence includes "keeping abreast of changes in the law and practice, *including the benefits and risks associated with relevant technology*." [Emphasis added][6]

The practical realities of properly managing a busy immigration practice, dramatic changes in mores concerning privacy, and the increased use of the Internet for communication, marketing and document storage, among other factors, have multiplied and complicated the scenarios that raise ethical obligations that go well beyond the generally understood proscription against unauthorized disclosure of client information. For example:

- Does the duty of confidentiality apply to prospective or former immigration clients?
- Can we store client documents "in the cloud" rather than a computer locked safely in our office?
- Is an immigration lawyer permitted to promote specific success cases on her website? At a party? On Facebook? At a CLE program?
- How does the duty of confidentiality apply when an immigration lawyer is providing legal services to both the petitioner and beneficiary in a family or employment petition-based application?
- Does the duty of confidentiality apply to information publicly available in court records? Social media? Print media?
- Is an immigration lawyer's confidentiality "disclaimer" in an email communication without more sufficient to protect the confidentiality of the information in the email?
- How does the immigration lawyer's duty of confidentiality apply to her non-lawyer paralegals or other non-lawyer employees? How does it apply to out-sourced foreign lawyers or foreign non-lawyer paralegals? What confidences can we share with a contract lawyer or temporary employee?
- May a lawyer disclose confidential information in his defense if the client files an ineffective

[5] In employment or marriage-based immigration petitions, for example, although the interests of the beneficiary and the petitioner are generally aligned, there is the potential that they may become adverse and implicate the duty of confidentiality. Rule 1.7 prohibits representation of concurrent clients whose interests are directly adverse or where there is serious risk that the representation of more than one client will negatively impact another current or former client, third person. [Rule 1.7(a)]. Under Rule 1.7(b), notwithstanding an actual or potential conflict, a lawyer is permitted to represent concurrent clients if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and(4) each affected client gives informed consent, confirmed in writing. *We discuss the confidentiality issues arising in "dual presentation" scenario more fully later in this chapter.*

[6] *See* MR 1.1.

assistance of counsel claim brings a malpractice suit or files a complaint with a lawyer disciplinary authority? By the same token, can a lawyer disclose confidential information when responding to an online negative consumer review?

- Are there other professional ethics rules or laws that impact on the basic duty of confidentiality?

The starting point for the answers to these and other questions regarding protection of client confidences begins with Model Rule 1.6, which we discuss below.[7]

A. Text of Rule

ABA Model Rule 1.6—Confidentiality of Information

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the lawyer-client privilege or otherwise prejudice the client.

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[7] We advise lawyers to check their own state's version of MR 1.6, the official comments to the state rule (as well as other related rules cited herein) that may vary substantially from the ABA rules. In particular, MR 1.6, which was amended by the ABA in 2012, added two additional subsections, among other changes. Added sub-section 1.6(b)(7)] is an exception that permits disclosure of confidential information without client consent or implied authorization in order to "detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm." Another addition, sub-section 1.6(c) imposes the requirement that a lawyer "shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." (*A summary of state variations from MR 1.6 is provided at pp. 56-59. The Summary of State Variations, while not a substitute for a lawyer's careful review her home state's version of MR 1.6, covers the more significant differences which may be understood more clearly in light of the discussion of MR 1.6 in this Module.)*

Notably, there is no analogous duty of confidentiality applicable to lawyers in general under the DHS/EOIR Rules of Practitioner Conduct. The EOIR's obligations as to the confidentiality of any disciplinary investigations and non-public sanctions are set forth in 8 CFR §1003.108. A copy of the DHS/EOIR Rule may be found in the Appendix.

A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment—Model Rule 1.6

[1] This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the lawyer-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The lawyer-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an

assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

Detection of Conflicts of Interest

[13] Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the lawyer-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[15] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all non-frivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the lawyer-client privilege or other applicable law. In the event

of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[17] Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with non-lawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special

circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

B. Key Terms and Phrases

Information relating to the representation

MR 1.6 is titled "Confidentiality of Information," but the word "confidential" is not used in the text of the rule; nor is it a defined term under MR 1.0. Rather, the prohibition against disclosing client information is described in the broadest sense in Rule 1.6(a) as "information relating to the representation." The phrase covers not only information otherwise protected by statute or common law, including the lawyer-client privilege and work-product doctrine, but *all* information arising from or concerning the representation.[8] This includes information obtained from any other source, such as public information.[9] The phrase also encompasses information which does not reveal the client's name or matter, but which might lead to the discovery of confidential information. The most common example would be the lawyer's use of a hypothetical when referring to an actual case or client.[10]

Suffice it to say, the scope of confidential information prohibited from disclosure under MR 1.6 is far-reaching. *A more detailed discussion of the confidential information under Rule 1.6 can be found at pp. 16-17.*

In the immigration context, an example of information deemed confidential under MR 1.6(a) may be simply the fact of the representation in the first instance. Another example would include information that a foreign national employee wants to keep confidential from his employer. The employee may disclose minor criminal history when applying for employment-based adjustment of status that he does not want to be disclosed to the petitioning employer. As discussed below, such a request may trigger an unresolvable conflict of interest problem if the lawyer is also representing the petitioner. *A more detailed discussion of conflicts of interest in the context of dual representation can be found at pp.20-25.*

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[8] *See, e.g., Nevada Ethics Op. 41* (information protected under Rule 1.6 much broader than more narrowly defined terms, "confidences" or "secrets" used in predecessor disclosure limitation under Model Code 4-101).

[9] See Comment 3 to Rule 1.6 stating that the "confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, *whatever its source*." [Emphasis added] *See, e.g., Iowa Supreme Court Lawyer Disciplinary Bd. v. Marzen*, 779 N.W. 2d. 757 (Iowa 2010)(Rule 1.6 violated even though information learned through the lawyer-client relationship was publicly available). It is worth noting that the Restatement of the Law Governing Lawyers has a different approach stating that there is no violation if the information is already generally known. Restatement of the Law (Third) Governing Lawyers, American Law Institute, §59

[10] Comment 4 provides that Rule 1.6: "…applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

Confidential information in the immigration context may also include a client's whereabouts when the lawyer has been asked by an Immigration and Customs Enforcement Officer for that information in pursuit of removing the client from the US.[11]

Informed Consent

Under MR 1.6(a) a lawyer is relieved from the obligation to hold information confidential if she obtains the client's "informed consent" to disclosure. The expectation of confidentiality belongs to the client and is hers to waive. Informed consent is defined in MR 1.0 (e) as referring to "an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." What constitutes adequate information varies from case to case.

At a minimum the lawyer should explain to the client the situation that has created the lawyer's need to disclose the confidential information, the advantages and disadvantages of the planned disclosure and the client's or other affected person's options or alternatives regarding the disclosure. In deciding how much to discuss in obtaining informed consent, the need to provide a complete explanation of how (for example, through what medium) the information will be disclosed and the impact of the disclosure through that medium cannot be overstated.

An Illinois criminal practice lawyer learned this lesson too late. After supposedly obtaining consent from the client to have others view an incriminating video for purposes of testing potential jury reaction, the lawyer posted the video of his client on YouTube. The client later claimed he had not consented to such disclosure. The Illinois disciplinary authorities found that even if the client had consented to disclosure on YouTube, the lawyer's concession that he did not discuss "the possible consequences or risks of posting the videos," rendered the alleged consent not "informed."[12]

The above scenario demonstrates the importance of providing all relevant information to make sure the client's consent is informed. In deciding the type and extent of information the lawyer should provide to the client in seeking consent, relevant factors would include the client's experience in legal matters generally and experience in making decisions about how confidential information is handled, and whether the client or other person is independently represented by other counsel in giving the consent to the disclosure.[13]

Although consent arguably could be inferred by the client's conduct after being presented with adequate information, consent should not be assumed if the client is merely silent. The lawyer should seek an affirmative response from the client before going ahead with the disclosure.[14] A prudent and conscientious lawyer would want to eliminate any doubt as to whether his client consented. For that reason, although not required under Rule 1.6, and as discussed below, the lawyer should consider obtaining written consent or verbal consent in the presence of the lawyer's partner or associate, paralegal or other employee subject to the duty of confidentiality.

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[11] However, an immigration lawyer may have to strategically disclose the address and contact information of a client with a removal order when requesting a stay of removal. Under those circumstances, a lawyer must obtain the informed consent of the client. In addition, clients have an obligation to provide their current addresses through address change notices to DHS or EOIR.

[12] *In re Jesse Raymond Gilsdorf*, No. 6225020, Review Board of the Illinois Attorney Registration and Disciplinary Commission, December 2013 (imposing five-month suspension)*[http://www.iardc.org/HB_RB_Disp_Html.asp?id=11207]*

[13] Comment 6 to Rule 1.6.

[14] *Id.*

Obtaining informed consent in immigration matters may be further complicated if the client is not fluent in English or lacks sufficient educational background or understanding of the United States legal system. The prudent and conscientious immigration lawyer should take precautions to compensate for those factors.

For example, an immigration lawyer may need to obtain the client's consent to disclose confidential client information to secure the services of an expert for asylum, waiver, or cancellation of removal applications. The lawyer would need to explain and ensure the client's consent to this type of disclosure for the client's benefit not only to comply with Rule 1.6, but also under circumstances in which the fee for the expert has not already been included in the lawyer's fee. Another example of carefully obtaining informed consent is if a client lies to a tribunal, and the lawyer remonstrates with a client to correct the court record or benefit application. Because the disclosure may likely have a negative effect on the outcome of the matter, the prudent and conscientious lawyer would need to be as clear as possible in explaining the consequences and obtaining consent.[15]

Confirmed in Writing

There is no requirement under MR 1.6 (a) hat the client's informed consent to disclosure of otherwise protected information be "confirmed in writing" or "signed in a writing" as there is in other Rules.[16] MR 1.0(b) states that when the phrase is used in reference to the informed consent of a person, it "denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." If a lawyer is not able to obtain the client's written confirmation of consent at the time it is given, the lawyer may obtain it within a reasonable time. As discussed above, although not always required, better practice suggests memorializing consent.

In the immigration context, if English is not the client's first language, the lawyer should have the writing translated.

Implied Authorization

In addition to obtaining a client's informed consent to disclosure of confidential information, under MR 1.6(a) a lawyer may disclose client information where "the disclosure is impliedly authorized in order to carry out the representation." The phrase "implied authorization," which is not a defined term in MR 1.0, is essentially another form of consent. Generally, a lawyer would be deemed to have implied authorization in circumstances in which the disclosure is beneficial to the representation.[17] *A more detailed discussion of disclosure where authorization is implied can be found at pp. 17-18.*

In immigration matters, a lawyer should advise the client that there may be times when he need not obtain the client's consent to disclosure of information because consent is implied. For example, when

[15] However, under MR 3.3, where the lawyer learns that the client has lied in a matter before a tribunal, a lawyer may be required to disclose confidential information, otherwise protected by Rule 1.6, to correct the lie even if the client has not consented. As in the case of MR 1.6, lawyers should check their home state's version of MR 3.3, since in some states the requirement of confidentiality under Rule 1.6 trumps candor toward the tribunal under MR 3.3.

[16] *See, e.g.*, MR 1.7(b)(4)(current client conflict); MR 1.8(a)(3)(business transaction conflict); MR 1.9(a)(former client conflict).

[17] As discussed in Comment 5 to MR 1.6 "a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a

matter." Comment 9 to MR 1.6 suggests that in disclosing information about compliance with the rules would be impliedly authorized, even if it was not permitted under the 1.6(b) exceptions. MR 1.2(a) also permits a lawyer to "take such action on behalf of the client as is impliedly authorized to carry out the representation." Furthermore, when representing a minor, under MR 1.14, any protective action that a lawyer may take pursuant to Rule 1.14(b) is impliedly authorized under MR 1.6(a).

representing a client on a substantive matter, such as a removal proceeding, the immigration lawyer ought to have implied authorization to discuss the client's case with an immigration adjudicator or with opposing government counsel, especially when trying to resolve or narrow down issues prior to the interview or hearing. A lawyer may get an unexpected call from the immigration adjudicator, opposing counsel or immigration judge to discuss such issues in advance and it may not be practically possible to get in touch with the client at that time. Implied authorization may also include allowing a third-party who manages your secure case management software system to view client information as part of their duties to manage the system. Another example is the IT maintenance provider, who may not be part of the firm, to check the health of the server and other related technical duties.

Fraud or Fraudulent

MR 1.6(b) provides certain exceptions to disclosure of confidential information when there is no actual consent or implied authorization. In particular, MR 1.6(b)(2) permits disclosure to "prevent" the client from committing a fraud (or crime) involving substantial injury to another's financial interests or property. MR 1.6(b)(3) permits disclosure to "prevent, mitigate or rectify" substantial injury to another's financial interests or property resulting from the fraud (or crime).[18] Under MR 1.0(d) the term "fraud" or "fraudulent" refers to "conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive." Under Comment 5 to MR 1.0, fraud would not require that misrepresentations be made negligently or that anyone suffered actual damages or relied on the misrepresentation or omission.[19]

Reasonable or Reasonably

The terms "reasonable" and "reasonably" appear in Rule 1.6 in several places. As set forth in the introductory language of MR 1.6(b), the lawyer is permitted to disclose confidential information under the listed exceptions only if he "reasonably believes" it is necessary to effectuate the purpose of the excepted circumstance. Under Rules 1.6(b)(1), (2) and (3), the lawyer also must be "reasonably certain" that the harm will occur if she does not disclose the confidential information. Also, under MR 1.6(c) the lawyer is required to make "reasonable efforts" to safeguard confidential information in order to prevent inadvertent disclosure of or unauthorized access to confidential information.

MR 1.0 (h) provides that when the term "reasonable" and "reasonably" is used in relation to a lawyer's conduct it denotes "the conduct of a reasonably prudent and competent lawyer."[20] This is an objective standard that will always depend on the circumstances involved.

Substantial

The term "substantial" appears in the first three exceptions under Rule 1.6(b) that permit disclosure in matters involving "substantial" injury to financial interests and property as well as "bodily harm."[21] MR 1.0(i) defines substantial as denoting "a material matter of clear and weighty importance." In the context of MR 1.6, a common sense understanding of what substantial means should suffice.

[18] In both exceptions under MR 1.6(b)(2) and (b)(3), the client must also have used or be using the lawyer's services in furtherance of the fraud or crime.

[19] *See* Comment 5, MR 1.0.

[20] *See* MR 1.0(h).

[21] *See* MR 1.6 (b)(1), (2), and (3).

Prospective Client

The phrase "prospective client" is not defined in MR 1.0; nor does it appear in Rule 1.6. However, the phrase is defined and addressed in Rule 1.18. Under that rule, a person or entity who "consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."[22]

In an immigration practice**,** lawyers often receive unsolicited calls for consultations from prospective clients who may share confidential information over the phone. This creates ethical challenges for the lawyer. The lawyer may seek general information about the situation to assess whether a consultation would be appropriate, but the lawyer may also learn confidential information during the course of the call. A U.S. citizen may call about pursuing permanent residence for her spouse who entered without inspection and works for an employer that the lawyer represents. A benched H-1B employee may call to inquire about her employer's wage obligation before giving her name or the name of her employer, and the employer turns out to be a current client. Under Rule 1.18, receipt of confidential information from a prospective client will likely trigger the same duty of confidentiality owed to current clients under Rule 1.6. In addition, under Rule 1.18, the potential for a conflict of interest may arise because a lawyer cannot represent a client with interests materially adverse to the prospective client unless both clients have given informed consent or the disqualified lawyer is screened within the firm from involvement with respect to this representation.[23] One example of an unwaivable conflict (based on the "significantly harmful" standard) with a prospective client is when an attorney is representing a battered spouse for a benefit, and gets a call from the abuser who may provide information that may be used against him. Another example is when a law firm is representing an H-1B worker in a DOL investigation against her employer, and the lawyer receives a call from the employer who could use the information against the employer in the DOL investigation.

A more detailed discussion of the duty of confidentiality to prospective clients can be found on pp. 19-20.

C. Annotations and Commentary

Rule 1.6(a)

> **Rule 1.6(a)**
>
> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

Rule 1.6(a) prohibits disclosure of confidential client information—referred to in the rule as ''information relating to the representation''—unless (1) the client gives his informed consent or there is implied authorization or (2) the disclosure comes within one of seven exceptions listed in the rule.[24]

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[22] *See* MR 1.18 and Comment 2, MR 1.18.

[23] There are scenarios in which a conflict of interest is per se unwaivable. *See Florida Bar Ethics Op.* 12-1 (June 22, 2012)(lawyer representing defendant in criminal matter cannot ethically advise client to take plea that includes waving any claim to ineffective assistance of counsel or prosecutorial misconduct)

[24] For purposes of this Module, we use the phrase "confidential information" to refer to the phrase "information relating to the representation." Confidential information under MR 1.6 has been construed to include the terms "confidences" and "secrets" used in the predecessor Model Code (DR 4 -101). As discussed, herein confidential information under Rule 1.6 is construed in the broadest terms. *See, e.g., Nevada Ethics Opinion* 41, supra, note 8.

What is Confidential Information?

Confidential Information

Most people who have a common-sense understanding of the word confidential would think it refers simply to information that is private. But the prohibition against disclosure in Rule 1.6(a) goes well beyond that. As discussed, the term "information relating to the representation" used in Rule 1.6(a) is extremely broad. It not only encompasses information that is otherwise protected by the lawyer-client privilege and work-product doctrine, but it also includes information that is publicly available or obtained by the lawyer from any source. As noted in Comment 3:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the lawyer-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The lawyer-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. *The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law....*[25]
>
> [Emphasis added]

Accordingly, Rule 1.6 also applies to information that, while not deemed actual client information, might lead to the discovery of confidential information. For example, lawyers often talk informally about their cases to each other in social or work situations without revealing the name of a client, perhaps focusing on difficulties they may be having with a client or a troublesome area of law. They may otherwise reveal bits of information to a friend or spouse about a matter—such as the amount of the fee involved, or what part of town a client lives, or how they got the case in the first instance—which may result in the discovery of protected confidential information.[26] This is not to say that lawyers may never talk about their cases in informal settings or hypothetically. It is human nature for lawyers to talk about their cases, and such discussions may also result in new ideas on how to approach a case. However, if lawyer do, they must be careful to heed Comment 4 to MR 1.6 which states that a "lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved."

Generally, under Rule 1.6, absent informed consent, implied authorization or a delineated exception, lawyers may not disclose the client's identity[27] or billing information.[28] With respect to billing

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[25] The source of the confidential information may even be an overheard conversation by unidentified speakers. *See New York State Bar Ethics Op.* 866 (May 23, 2011) (information discussed in overheard conversation deemed confidential, but did not otherwise fall within exceptions permitting disclosure).

[26] *See, e.g., Office of Lawyer Regulation v. Peshek*, 334 Wis. 2d 373 (2011) (lawyer violated duty of confidentiality by discussing her experiences as a public defender on a Blog, where lawyer did not disclose client's identity but information was sufficient to identify the client using public sources, in particular that the client had assaulted her in court). *See discussion of duty of confidentiality in light of widespread use of electronic communication (Social Media) at pp. 44-46.*

[27] *See e.g., People v. Hohertz*, 102 P. 3d 1019 (Colo. O.P.D.J 2004) (lawyer violated duty of confidentiality by calling client at home and discussing matter with client's roommate without client consent).

statements, unless they would reveal the substance of lawyer-client communications, billing records would not be protected by the lawyer-client privilege and production could be compelled by law or court order.

In the immigration context, without client consent, or implied authorization, a lawyer could violate Rule 1.6 when leaving a voice-mail message at a client's home requesting a document or a call back to make an appointment, contacting a third-party to verify information needed for the relief sought, or providing a detailed description of legal services that reveal confidential information or may lead to discovery of confidential information in a bill for fees being paid by a third party. While as a practical matter, immigration lawyers or non-lawyers under a lawyer's supervision may often need to disclose confidential information to obtain information or assistance, they must be careful to obtain their client's "informed consent" or be otherwise satisfied that authorization is implied. Immigration lawyers should generally obtain their client's informed consent to use outside agencies for routine requests for translations or credential evaluations, or when contacting experts within the client's field of expertise to write in support of an O-1 or EB-1 extraordinary ability petition. In addition, immigration lawyers who are rated by law directories such as Chambers and Partners are often asked to provide client references. In connection with such a request, the lawyer must always first ask the client's permission before providing his or her name as a reference. A lawyer must never assume that a client will consent in this situation, even a happy client, unless the client has actually consented.

Factors that Vitiate the Prohibition Against Disclosure of Confidential Information: Implied Authorization and Informed Consent

Implied Authorization

Whether or not authorization is implied under Rule 1.6(a) depends on the circumstances. Generally, authority will be implied when disclosure of client information is beneficial to the party whose information is protected. The term "implied authorization" includes admitting an otherwise incontrovertible fact or disclosing information to facilitate the "satisfactory conclusion" of the matter.[29] In both of these examples, the disclosures are helpful to the client.

It follows that a lawyer may have implied authorization to disclose client information when consulting another lawyer outside his firm to obtain advice about the client's matter, as long as the lawyer otherwise takes reasonable care to protect the confidentiality of the information.[30] As a practical matter, because the lawyer's consultation with another lawyer would benefit the client, there should be no reason why a client would not consent. However, if a lawyer is reluctant to tell his client that he may be consulting with another lawyer about the matter because he is concerned about appearing incompetent, the failure to obtain his client's consent might constitute a failure to explain under Rule 1.4(b).[31] Indeed, there are instances in which the failure to consult with other lawyers might render the lawyer incompetent under MR 1.1.

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[28] *See e.g., R.I Ethics Op.* 2002-02 (2002)(lawyer representing municipal council may not provide billing records requested by individual council member without entire council's consent]; *Di Bella v Hopkins*, 403 F.3d 102 (2d Circuit 2005)(billing records which do not contain details of legal services provided not privileged).

[29] Comment 5, Rule 1.6.

[30] *See ABA Formal Opinion* 98-411 (August 30, 1998) (discusses in detail the obligations of the both the consulting and consulted lawyer; implied authorization would not apply to privileged information protected by law) .

[31] Rule 1.4(b) provides that "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The protections afforded by Rule 1.4(b) and others fall under the generally understood obligation of loyalty to each client the lawyer represents.

For the same reason, generally lawyers within the same firm are impliedly authorized to discuss with each other information regarding the client.[32] In many cases, a client will choose a firm with multiple lawyers because of the additional legal resources they can provide. In some cases, where the information to be shared is highly sensitive or for other reasons, a client may instruct his lawyer to limit discussion of his case to certain lawyers only. To the degree that a lawyer has any doubts about this when the information is sensitive, she should discuss the issue with the client.

While a lawyer may be permitted, under one of the Rule 1.6 exceptions, to reveal client information to comply with other law or a court order, responding to governmental inquiries in general would not be impliedly authorized, especially where there is no beneficial purpose to the client.[33] A lawyer also would not be impliedly authorized to disclose to a third party involved in a legal matter information that would become public in the near future.[34] Where a lawyer is unsure as to whether authorization is implied, better practice warrants obtaining the client's informed consent.[35]

Informed Consent

As already discussed in detail, a lawyer may disclose confidential information if the client provides informed consent. *See discussion at pp.12-13.*

Revealing Confidential Information about Individuals Who Just Come in for Consults[36]

Prospective Lawyer-Client Relationship, Rule 1.18

The lawyer's duty of duty of confidentiality articulated in Rule 1.6 also applies to prospective clients. MR 1.18 (a) defines a prospective client as a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter."[37] In accordance with Rule 1.18, the protections afforded a prospective client are the same as those applicable to "former clients" under MR 1.9, which incorporates[38] the protections afforded to a current client under Rule 1.6, if the representation concerns the "same or a substantially related matter."[39]

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[32] *See* Comment 5 to Rule 1.6.

[33] *See e.g., Washington State Bar Op.* 2218 (2012) (lawyer whose is subject to state tax audit not required to permit access to client files unless each client consents).

[34] *See Lawyer Disciplinary Bd. v. McGraw*, 461 S.E.2d 850 (W. Va. 1995)*(*Attorney General improperly disclosed confidential information to third party about state's possible change of strategy even though information was contained in memorandum attached to motion to withdraw).

[35] As in most cases where a term is subject to interpretation, the rule of reason should apply. *See Pennsylvania State Bar Opinion* 2011-22 (May 26, 2011(in estate matter in which lawyer's client died, lawyer may reveal information consistent with promoting the deceased client's estate plan; where lawyer unsure about implied disclosure he should seek consent of executor).

[36] Although not expressly required under the Model Rules, in order to avoid conflicts issues created by speaking with or ultimately retaining a prospective client, lawyers should implement a conflicts check system. See Comment 3 to MR Rule 1.7, note 105 below.

See also Marian C. Rice**,** "*Maintaining a Conflicts Checking System"* November 2013, *http://www.americanbar.org/publications/law_practice_magazine/2013/november-december/ethics.html*

[37] MR 1.18 provides in pertinent part:

> (a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

[38] MR 1.9 (c) actually provides greater protection to the former and, under MR 1.18, to the prospective client, in that the lawyer is also prevented from using information relating to the representation to the disadvantage of the former client [or prospective client] with certain exceptions.

[39] MR 1.9 (*Duties to Former Clients*) applies to the representation of a client in the "same or substantially related matter" in which the [client's] interest would be adverse to those of the former client without the informed consent of the former client. This scenario may arise when the lawyer has represented multiple clients in a matter and then seeks to represent one of the clients against the other in a same or

In addition to the typical face-to-face meeting or telephone conversation between a lawyer and a person where the possibility of representation is discussed, a consultation may also occur if a lawyer, *through any medium*, such as a printed or electronic advertisement, requests or invites a person to submit written information about his case without providing appropriate warnings and cautionary information limiting the lawyer's obligation as to the information.[40] Without such warning the person is more likely to have a reasonable expectation that the lawyer is considering the representation. If that is the case, the person may be deemed a prospective client to whom the Rule 1.6 duty of confidentiality is owed.[41]

Conversely, a person who contacts a lawyer "unilaterally…without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a prospective client."[42] Even when a lawyer promotes her practice through advertisements or participation in public outreach forums, there may be any number of reasons why the lawyer is not willing to discuss possible representation with a particular person, *e.g.*, the lawyer may be too busy at the moment to take on new clients or may not practice in the area at issue.

Although not specifically mentioned in Rule 1.18, a person who consults with the lawyer merely to prevent the lawyer from representing another person is not acting in good faith and would not be deemed a prospective client entitled to the protections of Rule 1.6.[43]

For example, a detained foreign national may send an unsolicited letter to one or more immigration lawyers seeking representation. If the lawyer has had no previous contact with the foreign national and had not otherwise invited the contact, the foreign national should have no reasonable expectation that the lawyer is willing to discuss the possibility of representation.[44]

Revealing Confidential Information about a Former Client

Former Clients

The lawyer's duty of confidentiality covered in Rule 1.6 applies even when the lawyer-client relationship has concluded.[45] MR 1.9(c)(2) provides that the duty of confidentiality applies to former clients in the same manner as current clients. In addition, as discussed, under MR 1.9(c)(1) a lawyer is also prohibited from using confidential information to the disadvantage of the former client, irrespective of whether he discloses the information.[46]

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substantially related matter. In the immigration context, this is sometimes referred to as "dual representation," as in a marriage-based application for permanent residence, for example. *See below for a fuller discussion of how the duty of confidentiality is affected when an immigration lawyer undertakes representation of both the petitioner and the beneficiary in such a matter.*

[40] Comment 2 to MR 1.18.

[41] *See* discussion of prospective client below.

[42] Comment 2 to MR 1.18 explains that:

> In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, and is thus not a "prospective client."

[43] Comment 2 to MR 1.18. *See also Va. Ethics Op.* 1794 (2004)(where person posed as prospective client and imparted confidential information to the lawyer in order to create conflict of interest, person not a "prospective client" for purposes of Rule 1.6); *New York State Bar Ethics Opinion 923 (May 18, 2012)*(if lawyer determines prospective client contacted him to perpetrate a scam, lawyer may disclose confidential information to financial institution or law enforcement).

[44] *See Knigge v. Corvese*, 2001 U.S. Dist. LEXIS 10254 (S.D.N.Y. July 23, 2001) (unsolicited voice mail messages and emails concerning representation requesting a response, did not provide reasonable expectation of lawyer-client relationship, where lawyer did not respond).

[45] Comment 20, Rule 1.6.

[46] *Texas Bar Op.* 626 (April 2013)(where lawyer obtained confidential information about former company client, lawyer prohibited from investing in another company that would compete with the former client because lawyer's funds would help second company compete with

Revealing Confidential Information of One Client to the Other and Vice Versa

The Dual Representation Scenario: Interaction Between Rule 1.6 (a), Rule 1.4 (b), Rule 1.7 and Rule 1.9

A lawyer who represents more than one client in the same matter must be mindful of potentially competing ethical obligations. Under Rule 1.6(a) a lawyer owes her client the duty of confidentiality. Under Rule 1.4(b) a lawyer is required to explain matters that the client needs to know in order to make informed decisions about the representation.[47] Under Rule 1.7 a lawyer is prohibited from representing current clients in a matter in which their interests are adverse without the informed consent of each client.[48] Under Rule 1.9 a lawyer is prohibited from representing a current client in a matter that is the same or substantially related to a matter in which he represented the former client without the informed consent of both the current and former client.[49]

While not specifically referred to in the current Model Rules, these rules are premised on the lawyer's overall duty of loyalty to his client.[50] The lawyer's obligation keep the client's confidences, inform the client of all information necessary to make informed decisions about the representation and to avoid conflicts between current or former clients stem from the notion that a lawyer's first obligation is to represent his client in the best possible way, free of any self-interest or influence of others. Indeed, the duty of loyalty has been described as "the most fundamental of all fiduciary duties the legal profession owes to its clients."[51] The lawyer's duty of loyalty may be challenged when the lawyer represents two clients in the same matter, commonly referred to as joint representation.

In such cases, at the initial stage of representation there is a shared presumption between the clients that their interests are aligned and that the best interest of one is the same for all clients. In that circumstance, the lawyer's duty of confidentiality to each client under Rule 1.6 does not conflict with the lawyer's duty to disclose information to each client under Rule 1.4 (b).[52] The lawyer's affirmative duty to keep the client informed about her matter under Rule 1.4(b) enables each client to make informed decisions about the lawyer's representation consistent with his duty to act in each client's best interests.[53]

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former company and the information obtained by lawyer about his former client would be used to its disadvantage under Texas RPC 1.5(b)(3)[analogous to 1.9 (c).

[47] *See* MR 1.4.

[48] *See* MR 1.7.

[49] *See* MR 1.9.

[50] *See, e.g., Strickland v. Washington*, 466 U.S. 668, 692 (1984) (describing the duty of loyalty as "perhaps the most basic of counsel's duties"); *Williams v. Reed*, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733) ("An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. . . . When a client employs an attorney, he has a right to presume . . . that he has no interest, which may betray his judgment, or endanger his fidelity."). ABA Canons of Prof'l Ethics Canon 6 (1908); Model Code of Prof'l Responsibility Canon 5 (1980) (DR 5-101; DR 5-105).

[51] *See Lawrence Fox, The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty, Yale Law Journal On-line, March 27, 2012* Yale Law Journal *http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/professional-responsibility/the-gang-of-thirty%11three:-taking-the-wrecking-ball-to-client-loyalty/.*

[52] *ABA Formal Opinion* 08-450 (April 9, 2008)(Rule 1.6(a) duty of confidentiality applies "separately and exclusively to each representation" in the same matter; conflict created by one client's request not to disclose confidential to another client may be obvious at time of representation or at a later point where lawyer has duty under MR 1.4(b) to provide information to client to permit his making informed decisions about representation); *Washington D.C. Bar Op.* 296 (February 15, 2000)(concluding that mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another; lawyer would need to withdraw from representing both parties, in the absence of a prior agreement to deal with the conflict.)

[53] Comment 5 to Rule 1.4 states "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation. In

In immigration practice, the representation of more than one client in the same matter typically occurs in what has been termed "dual representation" in family or employment based cases where there is a petitioner and a beneficiary and generally the interests of each party are aligned. Dual representation may occur in marriage-based cases, such as where the petitioner is a U.S. citizen who wants her foreign-national spouse to obtain permanent residence. In employment-based cases, the U.S. employer wants to be able to fill a position with a particular employee and the employee wants the position and the legal status it confers.

However, later on in the representation, the interests of each of the clients may diverge and create a potential or actual conflict. The foreign national husband tells the lawyer he is involved with another woman and that as soon as he gets the green card he intends to obtain a divorce. Surely, the citizen wife would need to know that in order to decide if she wants to proceed with the petition. The employer tells the lawyer he is going to fire the employee, something which obviously the employee would need to know as well, especially if her immigration status is based on her employment.

Under either of the above examples, there would be no reasonable basis for the lawyer to assume that he is impliedly authorized to disclose confidential information of one client to another, when it would be harmful to the client to whom the lawyer owes a duty of confidentiality.[54] At that point, the respective interests of each client may have become actually adverse or the lawyer's representation of one client may be limited by his obligations to the other client.[55] Under MR 1.7, the lawyer then may have a prohibited conflict of interest between current clients, which can only be resolved if each of the clients waives the conflict based upon informed consent.[56] Absent that consent, the lawyer may be forced to withdraw from representing both clients in accordance with the requirements of Rule 1.16(a).[57]

There are not many bar opinions which specifically address dual representation in an immigration matter but the subject has been addressed in *New York State Bar Association Opinion* No. 761 (2003).[58]There, the lawyer had filed an I-130 petition on behalf of the husband who was married to the non-citizen wife. Apparently, while Form I-130 was still being processed, the wife of the petitioner

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certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(e)."

[54] *See, e.g.*, Washington *D.C. Bar Op.* 296 (February 15, 2000)(concluding that mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another; lawyer would need to withdraw from representing both parties, in the absence of a prior agreement to deal with the conflict.)

[55] *See* Comment 29-30 to Rule 1.7. In some cases, one party may simply want a lawyer to maintain confidentiality because disclosure might be embarrassing to the party or harmful to the relationship with the other party, such as when one relative may wish to keep secret from the other relative certain things such as the facts surrounding a prior criminal conviction, which needs to be disclosed on an immigration form.

[56] *New York State Bar Ethics Op.* 823 (June 30, 2008)(based on former but similar Code provisions regarding current and former clients, where defendants in a civil matter were jointly represented and disagreed as to litigation strategy, in that defendant A wanted to vigorously pursue a counterclaim, which could cause the plaintiff to take a more aggressive position in the litigation, and defendant B did not, lawyer could continue to represent A, if B consented after being advised that he has the right not to consent and that lawyer may disclose any confidential information of B to A; lawyer must also comply with court's procedures in seeking withdrawal."

[57] Comment 4 to Rule 1.7 states that, "Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client [under Rule 1.9] and by the lawyer's ability to represent adequately the remaining client or clients, given the duties owed to the former client." *See also* Comments 29-33 to Rule 1.6; *In re Hull*, 767 A.2d 197 (Del. 2001)(lawyer engaged in professional misconduct by failing to withdraw in a bankruptcy matter in which she represented husband and wife who separated and their interests became adverse).

[58] In a 1991 ethics opinion, the Los Angeles Bar Association cautioned a lawyer representing an undocumented foreign national with respect to a labor certification to obtain the informed consent of the employer and the foreign national, since disclosure of the foreign national's status and employment to the government would be required. Because revealing such information would be harmful to both the employer and employee the lawyer would have to advise both clients about the potentially harmful repercussions under the law before proceeding, *See Los Angeles Bar Assoc. Formal Op. 465* (April 15, 1991)

advised the lawyer that the husband was abusing her and she sought the lawyer's representation in filing a "self-petition" (Form I-360), which as a matter of statute did not require the husband's participation. It was unclear to the Committee, under the facts presented, whether (1) the husband and wife were jointly represented current clients, (2) the husband was the only client or (3) the husband only was a former client. By analyzing the New York Code provisions in effect at the time (which were very similar to the model rules discussed here), the Committee concluded that under any of the three scenarios, the lawyer could not ethically represent the wife in filing Form I-360, absent the husband's informed consent. If the representation were joint, there would be a conflict between the lawyer's duty of confidentiality to the wife and the lawyer's duty of loyalty to the husband. The wife would not want her husband to know that she was filing a claim of spousal abuse and the husband would need to know if she was since, among other reasons, a claim of spousal abuse might have law enforcement ramifications. If the husband was the client and Form I-130 was still pending, the lawyer could not separately represent the wife for the same reasons. If the husband was a former client (by virtue of the fact that Form I-130 had been granted and the representation concluded), the lawyer still could not represent the wife because the filing of Forms I-360 and the I-130 are substantially related matters.[59]

While this opinion, based on the facts presented, acknowledges that it was not possible to terminate the representation of the abusive husband and go forward with representing the wife, unless he understood that the future conflict would include an allegation of abuse to support the wife's self-petition, the following extract, suggesting that an advance waiver could have resolved the conflict, is worth noting:

> A client's consent to future conflicts is "subject to special scrutiny" (citation omitted). The clients' advance consent must be to a conflict that is consentable and the consent must be informed. The future conflict must be described "with sufficient clarity so the client's consent can reasonably be viewed as having been fully informed when given (citation omitted)."

Even though the opinion suggests use of an advance waiver, as a practical matter, it would be extremely difficult to secure such a waiver in this situation as the spouse would have to agree that he was abusive and but nevertheless consent to his wife being represented by the lawyer for a potential I-360 petition in the future.

As discussed in the above opinion, an immigration lawyer may encounter problems in a dual representation even after the matter has been successfully concluded. *New York City Bar Assoc. Ethics Op.* 1999-7 is instructive on that issue. Under the facts considered in the opinion, after the lawyer had successfully represented a husband and wife in a marriage-based legal permanent residency matter,[60] the couple's relationship deteriorated and they became adversaries in litigation. The husband requested from the lawyer "copies of the entire file" concerning the wife's immigration case. Without explicitly discussing the possibility of implied authorization to disclose the wife's confidential information based on the prior joint representation, the opinion concluded that the lawyer could not release the files absent the wife's consent [as set forth now in MR 1.6(a)] or unless the lawyer was required to do so by law or

[59] As previously discussed, under MR 1.9(a) pertaining to former clients, a lawyer may not represent a new client in the same or substantially related matter of the former client. Under MR 1.9(b)(1), a lawyer may not use confidential information to the disadvantage of the former client. Under MR 1.9(b), the prohibitions against disclosing confidential information of a former client are the same as to a current client.

[60] The wife had initiated the representation, but the husband was the petitioner. Both husband and wife signed the lawyer's notice of appearance as "their attorney of record." For the purposes of the opinion, the Bar committee deemed the husband and wife to have been co-clients.

court order [as set forth now MR 1.6(b)(6)].[61] The opinion noted that under the facts there was no indication that the lawyer previously had advised the husband and wife of the ethical issues raised by the joint representation in the event their relationship became adversarial. The opinion advised, essentially as a matter of good practice, that lawyers should do so in cases of dual joint representation. When dealing with joint clients, a lawyer may avoid conflict problems later by obtaining each client's informed consent to disclosure of confidential information at the inception of the representation. Such consent, however, may not be sufficient to permit disclosure at a later time, when disclosure of one client's confidential information would be harmful to that client, but necessary for proper representation of the other client. Accordingly, any advance consent would have to be premised on the understanding that if such a conflict occurred at a later time, the lawyer would likely have to withdraw from the representation of one or both depending on the circumstances. As to the document issue presented in City Bar opinion, in the absence of a conflict waiver, the lawyer would only have to hand over the documents belonging to each of the clients. A client cannot use a lawyer as a weapon against the other client by demanding documents pertaining to the other client, which he intends to use against the other client.

Given the potential problems associated with dual representation, a prudent and conscientious lawyer should memorialize each client's consent to a possible conflict confirmed in writing (sometimes referred to as an "advance conflict waiver").[62] The terms of the waiver may be explained and agreed to in a letter signed by each client or if there is a written representation agreement, the consent may be incorporated into the agreement as well.

As a matter of good practice, immigration lawyers, in particular, should use written representation agreements which spell out with some specificity the services to be provided, the fees to be charged, the obligations of the lawyer and responsibilities of the client and any other issues important to the representation, such as potential conflicts.[63]

An immigration lawyer may avoid the potential conflicts of interest in family and employment based petitions by only representing one party. Ideally, the other party would obtain separate counsel. If the other party does not retain counsel, the lawyer should be careful not to provide the unrepresented party with legal advice or otherwise lead the unrepresented to believe that the lawyer is representing both parties jointly. The unrepresented party is more likely to understand the arrangement if it is memorialized in writing. While retaining separate counsel may be preferred because of its seeming simplicity, the cost of hiring separate counsel for a petition-based application and the necessary communication between the lawyer and the other party's lawyer may make this approach impractical.

In what appears to be the more general practice, many lawyers undertake joint (or dual) representation making sure to apprise the clients that there may come a time when a conflict will occur which would require the lawyer to withdraw from the representation of one party or of both parties and they need to obtain each client's informed consent.[64] The written consent agreement could also provide that the lawyer will withdraw from representing either party. Since the employer may have other

[61] The opinion concluded that it would be permissible to provide the husband with copies of files that he had supplied and that related solely to him.

[62] *See* Rule 1.7(b).

[63] Lawyers are advised to check their home state's rules as to the whether written representation agreements or letters of engagement are required.

[64] For a comprehensive discussion of the issues presented by dual representation, *see* Cyrus D. Mehta, *Finding the "Golden Mean" in Dual Representation, 06-08, Immigration Briefings 1. (August 2006);* Bruce Hake, *Dual Representation in Immigration Practice*, Ethics in a Brave New World, 28 (AILA 2004).

ongoing cases and pays the fee, many lawyers would prefer to keep the employer as their regular client, and vice versa, and include that in the agreement as well.[65] If the continued representation of the employer involved pursuing a legal claim adverse to the employee, the lawyer would have to withdraw from both representations regardless of any agreement otherwise.

Rule 1.6(b)

> **Rule 1.6 (b)**
>
> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to achieve the purpose of the listed exception

When a lawyer does not have the client's informed consent or implied authorization to reveal confidential information, are there any other circumstances in which the lawyer may be permitted to make the disclosure?

Rule 1.6(b) provides seven exceptions that permit a lawyer to disclose confidential information even when the lawyer does not obtain the client's consent or there is implied authorization. The first three exceptions, under Rules 1.6(b)(1), (2) and (3), allow disclosure of confidential information for the protection of others, namely, to protect human life or prevent fraudulent or criminal conduct involving injury to financial interests or property. The remaining exceptions allow disclosure primarily for the benefit of the lawyer and the overall legal system. Specifically, those exceptions allow disclosure to obtain legal advice about complying with the rules of professional conduct [Rule 1.6(b)4)]; disclosure in civil controversies between the lawyer and the client, defense of a criminal charge or responses to allegations of wrongdoing in any proceeding concerning the lawyer's representation [Rule 1.6(b)(5)]; disclosure when required by other law or court order [Rule 1.6(b)(6)]; or disclosure to identify and resolve potential conflicts of interest [Rule 1.6(b)(7)].

It is important to note that in all of the exceptions, the extent of the confidential information that may be disclosed is limited to what the lawyer "reasonably believes" is necessary to achieve the purpose of the exception in the first instance.[66] Although not required under Rule 1.6, where the disclosure would be harmful to the client, and where practicable, the lawyer should try to persuade the client to take appropriation action [or not take action] to eliminate the need for disclosure.[67]

The lawyer may only reveal information sufficiently necessary to accomplish the purpose of the exception and only to those who need the information to accomplish its purpose.[68] In other words, the exceptions are not a license to disclose confidential information without regard to the fundamental principles underlying the duty of confidentiality in Rule 1.6(a) in the first place. In particular, when

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[65] This type of waiver has been referred to as an "accommodation waiver" and its viability has been established as a matter of law in some jurisdictions. *See, e.g., Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977)(introducing notion of primary client, and holding that there was no conflict between primary and former client when former had no expectation that information would be kept secret from primary client). In *Rite Aid Corporation Securities Litigation*, 139 F. Supp. 2d 649 (E.D. Pa 2001), the court held that the informed consent standard may be dropped to its lowest point when there is an "accommodation client."

[66] *See, e.g., Nebraska Bar Ethics Op.* 12-11 (Under Neb. Rule 1.6(c), where federal agency filed civil action against lawyer and clients alleging fraud, lawyer permitted to release confidential information in his defense adverse to his clients, but lawyer should make effort to limit access to the information through).

[67] Comment 16. This recommendation is consistent with MR 3.3's requirement that the lawyer remonstrate with a client who intends to commit perjury to refrain from such conduct in light of lawyer's duty of candor to the tribunal. *See AILA Ethics Compendium, Rule 3.3*

[68] *See In re Fuller*, 621 NW2d 460 (Minn. 2001)(sending more than 25 letters to individuals and government agencies revealing information about the client's chemical dependency and involvement in fraud, intimidation and murder, constituted a disclosure of more information to more persons than permissible).

disclosure is to be made in connection with a judicial proceeding, the lawyer is advised to disclose only what is absolutely necessary and to take steps to limit access to the disclosure.[69]

As previously noted, the exceptions in Rule 1.6 *permit but do not require disclosure*. *They are discretionary.* In determining whether to exercise the discretion permitted under the exceptions, the lawyer should consider her relationship with the client as well as those who might be injured. The lawyer's own involvement in the conduct or transaction at issue may also be a factor.[70] Ultimately, whether to voluntarily disclose confidential information under the Rule 1.6 exceptions is a lawyer's personal as well as professional decision.

The discretionary nature of Rule 1.6(b) disclosures in immigration matters is illustrated by the following example:

> An immigration lawyer has a consultation with a prospective client concerning a marriage-based petition for permanent residency for his "wife." The client confides that the wife has paid him $3000 to go ahead with the petition and the marriage, in essence, is a sham. The lawyer explains to the client that he cannot participate in a fraud. The client tells the lawyer he does not think he is committing fraud. He feels sorry for the woman and wants to help her out while making a few dollars for his efforts. The lawyer still declines to accept the representation because of the intended fraud. However, under the exceptions to disclosure set forth in Rule 1.6, the lawyer may but is not required to disclose the confidential information to prevent the fraud. (See other scenarios in comprehensive discussion of Rule 1.6 by head of Minnesota disciplinary authority.)[71]

While the exceptions set forth in Rule 1.6(b) are discretionary, a lawyer should be aware of other Rules which may *require* disclosure even when such disclosures are only *permitted* under Rule 1.6 or otherwise prohibited.[72] As noted in Comment 17 to Rule 1.6, a lawyer must be mindful of Rules 1.2(d), 4.1(b), 8.1 and 8.3.[73] Moreover, Rule 3.3(c) explicitly requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule.[74]

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[69] Comment 16 could not be more clear as to the limits on disclosure under the exceptions:

> If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[70] *See* Comment 17 to MR 1.6

[71] For a comprehensive discussion of Rule 1.6 from the point of view of Disciplinary Counsel, in which an analogous scenario is discussed, see *Disclosing Confidential Information,* Martin A. Cole, Director, Minnesota Office of Lawyers Professional Responsibility, published in *Bench and Bar* (April 2012)

[72] Because there are many state variations from Rule 1.6 and other related rules, we reiterate the necessity of checking a lawyer's home state rule for substantive differences. *See below for a summary of the state variations from Rule 1.6*. Lawyers should check as to state variations of any other rules cited herein as well.

[73] Rule 1.2(d) concerns a lawyer's counseling a client in commission of criminal conduct; Rule 4.1(b) concerns disclosure of confidential material facts to third parties in accordance with Rule 1.6; Rule 8.1 (b) concerns disclosure of confidential information in context of admission to the Bar in accordance with Rule 1.6; Rule 8.3 (c) concerns disclosure of confidential information in context of reporting another lawyer's professional misconduct to the proper authorities.

[74] Rule 3.3(d) concerns disclosure of confidential information to prevent fraud on a tribunal irrespective of the duty of confidentiality set forth in Rule 1.6. See Module 1 of the AILA Ethics Compendium for a comprehensive discussion of Rule 3.3. *As previously noted, lawyers should check their home state's version of MR 3.3 since there are some states in which confidentiality trumps candor to a tribunal*.

MR 1.6(b)(1)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

Revealing Confidential Information To Prevent Death or Bodily Harm

Under Rule 1.6(b)(1), a lawyer is permitted to disclose client confidential information to prevent a client or a third party from causing substantial bodily harm or death.[75] It makes no difference if the perpetrator is not the client as long as the confidential information about the conduct is related to the representation. Given that disclosure of such information is a drastic measure, a lawyer may not reveal confidential information only out of a general worry or concern that such injury might occur. Under the rule, he needs to be "reasonably certain" of the impending harm. Although not defined in MR 1.6, the Comment explains that "reasonable certainty" would be established by information leading to the conclusion that injury is "imminent" or if there is a "present and substantial threat" that harm will occur at later time if the lawyer remains silent.[76]

Making that determination may still be difficult where the injury is not obvious. Comment 6 provides as an example a situation in which lawyer knows that a client has accidentally discharged toxic waste into a town's water supply. Under Rule 1.6(b)(1), the lawyer would be permitted to reveal this information to the authorities if he was reasonably certain that a person who drinks the water would be at a substantial risk of contracting a life-threatening or debilitating disease if the lawyer did not otherwise disclose the information.

A less compelling fact pattern concerning water quality demonstrates the difficulty in determining whether a lawyer has enough information to be "reasonably certain" that death or bodily harm will occur: A lawyer obtains information that a client whose business had failed to pass a water quality inspection (passage of which was a requirement to get an operating license), intends to submit water from a different source in order to pass the test and get the license. Where the lawyer had no knowledge of the actual water quality, the lawyer could not be "reasonably certain" that death or physical injury was imminent or if harm will come in the future if the lawyer did not disclose the information.[77]

In the immigration context, the lawyer may need to disclose information to protect a client. Because so much is at stake for the client, an immigration judge's decision to reschedule a final hearing, and postpone resolution of the case, may transform an already depressed client into a suicidal one. If the client threatens to commit suicide and has a specific plan, the lawyer could under Rule 1.6(b)(1) contact an emergency responder to protect the client.

In another immigration example, a lawyer in a marriage-based application for permanent residence after an I-130 petition has been approved may learn that the applicant is HIV positive and has not told

[75] "Substantial bodily harm" includes child abuse since "by definition sex acts with minors are non-consensual; and such activity likely involves violence and intimidation." *Illinois Bar Association Professional Conduct Advisory Opinion* 12-08 (March 2012)(noting that Section 66, *Restatement Third, Law Governing Lawyers* (2000) includes child sexual abuse in the definition of "serious bodily harm.")

[76] *See* Comment 6 to Rule 1.6.

[77] *See New York State Bar Op. 866* (May 23, 2011)(Disclosure not permitted under death or bodily injury exception (Rule 1.6(b)(1)) in matter involving client's failure to pass water inspection, where lawyer did not have sufficient knowledge of facts to be deemed "reasonably certain" of death or bodily harm to others.) Notably, the Committee left open the possibility that disclosure might be permissible under Rule 1.6(b)(2) if the lawyer was able to conclude with reasonable certainty that the client's intention to submit for inspection water from another source was a crime or fraud causing injury to financial interests or property.

his spouse. To disclose this confidential information under Rule 1.6(b)(1), the lawyer would need to be reasonably certain of harm to the spouse, which would be the case here.

> ***MR 1.6(b)(2)***
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

Revealing Confidential Information to Prevent Client from Committing a Crime or Fraud

Unlike the first exception concerning death or bodily harm, Rule 1.6(b)(2) applies solely to the conduct of a *client*[78] and contains two prongs which limit the scope of the exception. The first prong requires that the client's conduct must be deemed a fraud or a crime. If the conduct does not satisfy the elements of fraud as defined by MR 1.0(d) or a crime (as a matter of law), disclosure is not permitted. Further, the crime or fraud injury is limited to financial harm or harm to property**.**

The second prong requires that the client, by virtue of the representation, has used or is in the process of using the lawyer's services to perpetrate the fraud or crime. By its terms, Rule 1.6(b)(2) refers to fraud or crimes that have not yet been committed. The use of the lawyer's services in furtherance of the wrongful conduct is deemed a "serious abuse of the client-lawyer relationship" which forfeits the protection of confidential information afforded by Rule 1.6(a).[79] The client can, of course, prevent such disclosure by refraining from the wrongful conduct.[80]

Although Rule 1.6(b)(2) clearly does not require the lawyer to reveal the client's misconduct, a lawyer must also consider the duty not to counsel or assist a client in conduct the lawyer knows is criminal or fraudulent under Rule 1.2(d). Under such circumstances, the lawyer may be required to withdraw under Rule 1.16(a)(1), which requires the lawyer to withdraw on the grounds that the continued representation will result in violation of the Rules or other law. Rule 1.16(b) permits withdrawal under various circumstances triggered by the client's intent to commit or commission of a fraud or crime.[81]

In the immigration context, an employer client may insist on backdating I-9 forms in an employer sanctions case to avoid a substantial fine. The lawyer, who has already entered an appearance in the

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[78] *See Pennsylvania Bar Association Op.* 2011-29 (July 8, 2011)(Under Penn. Rule 1.6 (b)(3) which permits disclosure "to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used," divorce lawyer is not permitted to disclose client's husband's crime of installing spyware on her personal computer on basis that (b)(3) limits disclosure only in cases of client's crime).

[79] *See Washington State Bar Association Advisory Op.* 2229 (2012)(Under Wash. RPC 1.6 (b)(2) which is somewhat broader than MR 1.6(b)(2) in that it applies to the commission of any crime, lawyer permitted to disclose confidential information to law enforcement authorities about his client's involvement in ongoing financial scam; under Wash. D.C. rules if lawyer discloses he will compelled to withdraw under Wash. RPC 1.16(a)(1) on basis that continued representation would likely create conflict of interest in violation of RPC 1.7) ; *Philadelphia Bar Association Ethics Op*. 2008-9 (August 2008)[Under Penn. Rules 1.6(c)(2) and (3), which are similar to MR 1.6(b)(2) and (3), trusts and estates lawyer permitted to disclose executor's ongoing failure to disclose her possession of $360,000 in bonds which were discovered after matter settled, and may be required to disclose under Penn. case law and Penn. Rule 3.3 and likely will be required to withdraw under 1.16(a)].

[80] *See* Comment 7 to Rule 1.6.

[81] *Id.* Comment 7 also refers the lawyer to Rule 1.13(c) which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances

case, must take steps to avoid providing services for the employer in furtherance of this wrongful conduct. In addition, if the employer is a corporation and if the individual insisting on the backdating reports to a more senior official of the corporation, under MR 1.13 (applying to organizations with constituents), a lawyer may report a matter up the management chain to the highest authority.[82] If the highest authority in the corporation fails to act, the lawyer may reveal the wrongdoing, even if disclosure is prohibited under Rule 1.6, to prevent substantial injury to the corporation. Other types of wrongful conduct by an employer may involve visa fraud, such as using B-1 visa holders to perform skilled labor jobs in the United States without an appropriate work-authorized status.[83]

In a marriage-based case based on an approved I-130 petition, the applicant for adjustment of status learns he is still married to his prior spouse because a divorce was never finalized, but wants to move forward with the adjustment hearing without telling his current spouse. Because other important legal rights are at stake, the lawyer may reveal to the petitioning spouse that the marriage is not val*id.*[84]

MR 1.6(b)(3)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Disclosing Confidential Information After a Crime or Fraud Has Occurred

Rule 1.6 (b)(3) parallels the elements of Rule1.6(b)(2), but applies to situations in which the client's crime or fraud has already been consummated. This sub-section provides for situations in which the harm to the effected person could be prevented, rectified or mitigated if the lawyer disclosed confidential information to the appropriate party. As in the case of Rule 1.6(b)(2), the lawyer must limit the extent of disclosure—as to the amount of information and to whom it is disclosed—to that which is reasonably necessary to accomplish the purpose of the disclosure. Paragraph (b)(3) does not apply when

[82] *Client-Lawyer Relationship,* Rule 1.13 provides in pertinent part:

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

[83] A case in point is the software company, Infosys, which agreed to a civil settlement with the Department of Justice as to allegations of systemic visa fraud and abuse of immigration processes by paying a record $34 million in fines and agreeing to enhanced corporate compliance measures. *See http://www.justice.gov/usao/txe/News/2013/edtx-infosys-103013.html*.

[84] While disclosure to prevent a fraud is discretionary under Rule 1.6(b)(2), because this matter is before a tribunal (here, the USCIS), under MR 3.3, the lawyer would be obligated to reveal the fraud if remedial measures were unsuccessful.

a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense**.**

MR 1.6(b)(4)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(4) to secure legal advice about the lawyer's compliance with these Rules;

Disclosing Confidential Information To Obtain Legal Advice About Ethical Obligations

A lawyer's disclosure of confidential information adverse to the client's interests may have far-reaching negative effects on the client and the lawyer-client relationship, as well as expose the lawyer to disciplinary or other sanctions, should it turn out the disclosure was not permitted. For that reason, a prudent and conscientious lawyer may wish to obtain legal advice about his obligations under Rule 1.6(b) and any other related rules concerning his client's matter. In many circumstances, the client would likely consent or a good argument could be made that authorization is implied. In most situations, disclosing information to secure such advice would be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, Rule 1.6 (b)(4) expressly permits such disclosure.

In the immigration context, a lawyer may need to consult with counsel concerning the appropriate language for a lawyer-client relationship disclaimer for her website or other social media or proper language for an "Advance Conflict Waiver." For example, with respect to waivers, the lawyer may wish to carve out a waiver on behalf of an employee client who may not wish to disclose past criminal history to an employer client on a visa application, but which may not hinder her admissibility to the US. Similarly, a lawyer may wish to carve out a waiver of confidentiality with respect to the employer client who does not wish to divulge confidential financial information to the employee client. A difficult unresolved area concerns an employer who may want to have confidential communications with the lawyer about layoffs, which may adversely impact the employer's ability to file a labor certification application on behalf of the foreign national employee. It remains a question as to whether such waivers may be upheld. A lawyer also may need to consult with counsel on what documents in a file may or need to be returned in an I-140 filing since that issue may involve both ethics rules and the applicable state law.

MR 1.6(b)(5)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

Disclosing Confidential Information To Advance a Claim or Defend Against Actions

Rule 1.6(b)(5) addresses the unfortunate circumstance in which the lawyer-client relationship deteriorates, becomes overtly adversarial, or even worse, exposes the lawyer to claims of wrongdoing in a disciplinary, civil or criminal context. There also may be other situations that involve allegations of

wrongdoing against the lawyer, but in which the lawyer is not actually a party.[85] Rule 1.6(b)(5)covers these circumstances in three prongs, each of which permits the lawyer to reveal confidential information under the general caveat that the lawyer reasonably believes that disclosure is necessary to accomplish the purpose of the exception.

The first prong of sub-section (b)(5) permits the lawyer to reveal confidential information either to *assert a claim* or *defend* against allegations of wrongdoing in a *controversy* between the lawyer and client. Controversy is broadly interpreted not to require the actual commencement of a formal action. However, mere derogatory comments about a lawyer, for example, made by a former client to the press, on a website, or even to other individuals, would not constitute a controversy within the scope of the rule and the exception would not apply.[86]

The now fairly common phenomena of blogs and other social media on which real clients (or sometimes "impostors") post negative reviews or comments about a lawyer can create a risky ethical trap for the prudent and conscientious lawyer.[87] Often the lawyer's response is written in haste because the lawyer is upset and angry.

Even when the negative comments are clearly fabricated, the lawyer still will have violated Rule 1.6 if the lawyer reveals confidential information in her response.[88] The prudent and conscientious lawyer may still respond to on-line negative reviews, but he must avoid at all costs the disclosure of harmful confidential information and ought to seek assistance from an objective third-party before posting the comments. A boiler-plate type of response rejecting the allegations of wrongdoing with the indication that the lawyer is restrained from responding specifically to the allegations because of his duty of confidentiality would be a safe alternative response.

Only the first prong permits a lawyer to reveal confidences to *assert* a claim, for example, to collect an unpaid fee. The presumption in that case is that the client as beneficiary of a fiduciary relationship with the lawyer may not exploit it to the detriment of the fiduciary.[89] The same logic follows in cases in which an in-house lawyer brings an action for wrongful discharge against the company after being fired for refusing to engage in unethical or illegal conduct. Under the first prong of Rule 1.6(b)(5), the lawyer would be permitted to disclose confidential information in pursuit of that action as well.[90]

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[85] An example would be an ineffective assistance of counsel claim which we discuss in more detail below.

[86] *See, e.g., Louima v. City of New York*, No. 98 CV 5083(SJ), 2004 WL 2359943 (E.D.N.Y. Oct. 5, 2004)("mere press reports" about lawyer's conduct do not justify disclosure of client information even if the reports are false are unfounded); *New York County Ethics Op.* 722 (1997)(client's criticism about lawyer orally communicated to neighbor was mere gossip and did not trigger exception to confidentiality rule); *In Re Skinner*, 740 S.E.2d 171 (2013) (lawyer violated duty of confidentiality by responding on the Internet to former client's negative reviews revealing personal and confidential information about the client); *In re Quillian* 20 DB Rpter 288 Oregon Supreme Court (2006)(lawyer violated duty of confidentiality by posting former client's personal and medical information on Bar list serve to warn other Workers Compensation lawyers about difficulties with client who had refused to accept reasonable offer from Workers Compensation Board)

[87] Since the duty of confidentiality applies only to current, former or prospective clients, where the lawyer knows that the party posting a negative comment under a pseudonym is not a client (and the lawyer would be able to prove it), the lawyer owes no duty of confidentiality to that person.

[88] An Illinois lawyer has been the subject of a disciplinary investigation for revealing confidential information in a response to an on-line bad review. After providing some general information in denying the offensive allegations, the lawyer went too far by revealing that the client had assaulted a co-worker. *See http://www.lawlogix.com/blog/ethical-considerations-when-immigration-clint-reviews-go-awry.*

[89] *See* Comment 11, Rule 1.6(b)

[90] *See. e.g., Burkhart v. Semitool, Inc.*, 5 P.3d 1031 (Mont. 2000) [Lawyer permitted to reveal confidential information in wrongful termination claim under Montana's equivalent to MR 1.6(b)(5)]; *GTE Products v. Stewart*, 653 N.E.2d 161 (Mass. 1995)(In-house lawyer may reveal confidential information limited to extent necessary to prove counterclaim of retaliatory discharge); *Spratley v. State Farm Mut. Auto Ins. Co.* (78 P.2d 603)(Utah 2003)(In-house lawyer permitted to disclose confidential information to support wrongful discharge claim, but lawyer and courts should exercise great care in limiting disclosure to extent necessary); *Oregon Formal Opinion No . 2005-136 (*where in-house lawyer

The second prong permits a lawyer to *defend* a civil claim or criminal charge against the lawyer based on conduct in which the client was involved. This would include defending against a former client's claim that the lawyer committed malpractice, converted client funds or defrauded the client in some way. It also would include defending a third-party claim alleging wrongful conduct by the lawyer and client acting together.[91]

The third prong provides the lawyer with greater flexibility in revealing confidential information in that it permits a lawyer to disclose confidential information "to respond to allegations in any proceeding concerning the lawyer's representation of a client." This would include allegations by any third party, such as a case in which an opposing party in the matter alleges wrongdoing by the lawyer or a fee dispute with a third party who paid the client's fee.[92] Although not specifically mentioned in the Rule or the Comments, as discussed below, under certain circumstances a lawyer may be permitted to disclose confidential information in response to ineffective assistance of counsel claims.

Ineffective Assistance of Counsel Claims in Criminal and Immigration Matters

Criminal Matters

The question of whether a lawyer is permitted, and if so, in what manner, to reveal confidential information under Rule 1.6(b)(5) is more difficult to determine in the context of an ineffective assistance claim (IAC). In the first instance, such claims clearly do not come within the reach of the first two prongs of the Rule. An IAC claim is not a "controversy between the lawyer and the client;"[93] nor is it a "criminal charge or civil claim against the lawyer" which the lawyer must defend.[94] Only the third prong of the Rule, which permits disclosure of confidential information "to respond to allegations in any proceeding," applies. However, as discussed, the extent of information revealed and its timing are circumscribed, under the introductory language in Rule 1.6(b) [and the Comments], to that which the lawyer reasonably believes is necessary to achieve the purpose of the exception. Further, it is important to remember that the standard for "reasonable" is an objective one as set forth MR 1.0(h).

The issue of whether disclosure is reasonably necessary in IAC claims, particularly as to timing, has been commonly addressed in the context of an appeal of a criminal conviction where the prosecutor opposing the appeal will likely seek assistance from defense counsel in providing otherwise confidential information—which may include privileged communications.[95] Although an IAC claim normally waives

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refused to make an affirmative misrepresentation on patent application, which is a criminal offence, and was subsequently fired, lawyer permitted to disclose confidential information about events in pursuit of wrongful termination suit, but disclosures must be limited to that which is reasonably necessary to establish the claim asserted, including where appropriate insistence on obtaining protective order). Where, as in the case of California, there is no self-defense exception, similar disclosures would be prohibited. *But* S*ee California State Bar Formal Opinion* No. 2012-183 (where there is no self-defense exception, lawyer contemplating wrongful termination case may only disclose confidential information to her lawyer for purposes of learning rights, but may not disclose in any lawsuit.)

[91] *See, e.g., Nebraska Ethics Advisory Op.* 12-11 (where lawyer named as co-defendant along with two clients in suit brought by federal agency alleging fraud and violation of federal trade regulations, lawyer permitted to disclose client confidential information under exception to rule so-permitting, but disclosure must also made in a manner that limits access to the information.)

[92] *See Oregon Formal Op.* 2005-104 (Lawyer permitted to disclose confidential information in two unrelated scenarios: (1) in defense of disciplinary complaint brought by non-client on opposite side of transaction that lawyer handled for his client, as well as (2) in defense of malpractice action brought by former client who had refused to pay lawyer's fee).

[93] *ABA Formal Opinion* 10-456 (July 14, 2010)(citing Utah Bar Ethics Advisory Op. 05-01 for proposition that dispute over the facts between a criminal defendant and his former counsel in an ineffective assistance claim is not a "controversy" as contemplated by the rule.)

[94] *Id.*

[95] *See, e.g., Hicks v. U.S.*, 2010 US Dist. LEXIS 137268 (S.D. W. Va. Dec. 28, 2010)(in IAC matter, where former defense lawyer opposed motion to compel disclosure of confidential information on grounds that it was premature and prosecution argued that under Rule 1.6(b)(6) lawyer has discretion to disclose, and that defendant had in any event waived lawyer-client privilege, court found that it needed to

the lawyer-client privilege, the privilege still comes within the protections afforded by MR 1.6, which limits the extent of the disclosures to what the lawyer "reasonably believes is necessary"—presumably, to show that his representation was not ineffective.

In contemplation of this scenario, Comment 16 advises:

> If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent.

Support for only limited disclosure and at the appropriate time is found in *ABA Opinion* 10-456 (July 14, 2010). The opinion concluded that notwithstanding a lawyer's desire to prevent the harm to him that would result from an IAC finding, voluntary premature disclosure outside the context of the proceeding, would likely not be justified.[96]

Immigration Matters

The manner in which IAC claims are adjudicated in immigration matters is somewhat different from criminal matters and appears to afford an immigration lawyer more latitude in exercising the discretion to reveal confidential information.[97] Under *Matter of Lozada,* 19 I&N Dec. 637 (BIA 1988), a foreign national making an IAC claim in support of a motion to reopen a deportation case is required to inform the former lawyer of any IAC allegations to allow her the opportunity to respond. Any response from the lawyer or report that she failed or refused to respond must be submitted with the motion. Further, if it is asserted that the prior lawyer's handling of the case involved a violation of ethical or legal responsibilities, the motion must reflect "whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not."[98]

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supervise disclosure of privileged communications to assure that waiver was applied narrowly and only for the purpose of litigating the *habeas corpus* claim.)

[96] *ABA Formal Opinion* 10-456 concludes that it is not reasonably necessary for a lawyer to voluntarily disclose confidential information in response to ineffective assistance of counsel claim before the prosecution has sought information from her by moving to compel disclosure in judicial proceeding. The Opinion notes that the IAC claim may be dismissed on procedural grounds thereby eliminating any necessity to resolve the IAC claim. Damage to the lawyer's reputation without more would not be enough to justify disclosure before it is clear that the issue is before the Court. The Opinion notes further that even if the confidential information is relevant but not privileged, the limitations to the extent of disclosure under Rule 1.6 would still apply.

[97] The difference in the way IAC claims are treated in an immigration matter may account for the difference in that foreign nationals do not have a Sixth Amendment constitutional right to effective assistance of counsel. Courts have found, however, that foreign nationals have a due process right to a fundamentally fair hearing which by definition would be undermined by IAC. In *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003), even though the BIA acknowledged no constitutional right to counsel, it still affirmed *Matter of Lozada* as a right to a fundamentally fair hearing under the Fifth Amendment's Due Process clause, and IAC is a violation of due process. *See also Zeru v. Gonzales*, 503 F.3d 59 (1st Cir. 2007); *Rabiu v. INS*, 41 F.3d 879 (2d Cir. 1994); *Contreras v. Attorney General*, 665 F.3d 578 (3d Cir. 2012); *Denko v. INS*, 351 F.3d 717 (6th Cir. 2003); *Maravilla Maravilla v. Ashcroft*, 381 F.3d 855 (9th Cir. 2004); *Osei v. INS*, 305 F.3d 1205 (10th Cir. 2002); *Dakane v. United States AG*, 399 F.3d 1269 (11th Cir. 2004).

[98] *See also* 8 CFR §208.4(a)(5)(iii) where the element of "extraordinary circumstances" justifying untimely filing of asylum application may be satisfied by proof of ineffective assistance of counsel, provided that:

> (A) The alien files an affidavit setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (B) The counsel whose integrity or competence is being impugned has been informed of the allegations leveled against him or her and given an opportunity to respond; and (C) The alien indicates whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not.

Based on the above, an immigration lawyer would be permitted under Rule 1.6(b)(5) to submit a response to an IAC claim which discloses confidential information harmful to the client.[99] Similarly, if the disciplinary authority receiving the foreign national's complaint determined to investigate the IAC claim and request an answer to the allegations, Rule 1.6(b)(5) would also permit disclosure of otherwise confidential information, under either the second or third prong of MR 1.6(b)(5). As in all of the listed exceptions in Rule 1.6(b), the lawyer would be subject to the general limitation that she disclose only what is reasonably necessary to achieve the purpose of the exception.

MR 1.6(b)(6)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(6) to comply with other law or a court order[100]

Disclosing confidential information when required to do so by law or court order

Rule 1.6(b)(6) permits a lawyer to disclose information that he is *otherwise required* to do under other law or when so ordered by a Court.[101] Since a lawyer is obligated to comply with the law or court order, like any other person and, in particular, as an officer of the court, there would seem to be no need to include this exception in the Rule. The Comments, however, provide important guidance for the lawyer.[102] For example, when a lawyer is compelled to disclose confidential information, he is reminded to discuss this with the client in accordance with the duty to explain imposed by Rule 1.4(b). Under the circumstances, the client needs to be advised because he may need to decide, among other things, what action, if any, he should take. The lawyer is also reminded that in accordance with his primary duty to maintain client confidences, he should not be a passive bystander and should assert on the client's behalf "all non-frivolous claims that the order is not authorized by other law, that the information is protected the lawyer-client privilege or other applicable law."[103] In such circumstances, the duty to explain would include discussion of an appeal, if the lawyer's claim is denied.

In an immigration matter, for example, a lawyer might be served with a subpoena in connection with a divorce action involving married clients she once represented for adjustment and removal of conditions. In the divorce action, spousal support of the naturalized spouse is at issue. The husband's lawyer calls the immigration lawyer requesting the entire file. The wife calls the lawyer and directs him

[99] In some instances, the lawyer's response may actually support the foreign national's rendition of the facts. *See re N-K- & V-S-, Applicants, Decided March 13, 1997,* United States Department of Justice Executive Office for Immigration Review Board of Immigration Appeals (in response to notice of IAC allegations, lawyer submitted a response which supported foreign national's claim in part that the representation was limited to obtaining release from custody, notwithstanding, well-settled principle that there is no "limited" appearance of counsel in an immigration proceeding; lawyer's response supported the facts underlying the claim of IAC).

[100] As previously discussed in other sections, because states vary as to this exception in that some also includes the necessity of complying with the professional conduct rules themselves, lawyers should check their home state's rule. *See, e.g.,* New York RPC 1.6 (b)(6) where the exception also covers disclosure "when permitted or required under these [N.Y.'s] rules"

[101] *See ABA Formal Ethics Op.* 94-385 (July 5, 1994)[pre-dating current Rule 1.6, but addressing similar exception under predecessor Code DR 4-101(c)(30], where government agency issued subpoena to examine lawyer's files for particular client, including time records and disbursement and payment records, which also may contain information protected by lawyer-client privilege lawyer, lawyer must comply with subpoena to produce confidential documents after exercising professional responsibility to seek to limit the subpoena, or court order on any legitimate available grounds, and only after the lawyer's efforts are unsuccessful at the trial level or on appeal); *See also Virginia Legal Ethics Opinion* 1844 (December 8, 2008)(where duties of Guardian Ad Litem (GAL) for children require identification and recommendations as to outcome in cases involving child abuse, disclosure in order to comply with GAL standards permitted under Rule 1.6(b)(6).

[102] *See* Comments 12 and 15 to Rule 1.6.

[103] Comment 15 (and any opinions).

not to release the file. The representation agreement for the matter is silent on the question of whether there was dual representation or not. The lawyer decides to take the safest course and refuse to release the file even though under Rule 1.6(b), he is permitted to provide the file containing confidential information based on the court ordered subpoena. However, heeding the Comments to Rule 1.6(b)(6), after discussion with the wife, the lawyer makes all non-frivolous arguments in a motion to quash the subpoena to let the court decide.

In another example, the immigration lawyer representing the client may also receive a subpoena for a client's file or files in the context of a criminal grand jury investigation. As in the example above, the immigration lawyer must not instinctively hand over the files, but must weigh the pros and cons with the informed consent of the client, whether to comply with the subpoena or to move to quash it under the attorney-client privilege doctrine. In such situations, the immigration lawyer should seek the counsel of a criminal defense attorney.

A special problem may be created for an immigration lawyer employed by a social services agency in a state in which social workers and mental health workers, for example, are required to report child abuse (or other physical dangers). If there is no parallel requirement for lawyers, the lawyer's ability to disclose confidential information to the social worker would be proscribed under Rule 1.6. As discussed above, in the normal course, a lawyer is impliedly authorized to disclose confidential information to non-lawyer employees under her supervision, as long as she takes steps to insure that the non-lawyer employees understand they are subject to the same duty of confidentiality as the lawyer. However, if the social worker is required by law to report the child abuse, he would not be allowed to keep that information confidential. Best practice for the prudent and conscientious immigration lawyer, here, would be to obtain the client's informed consent to reveal such information to the social worker at the outset of the representation. Informed consent would obviously include advising the client of the mandatory child abuse reporting requirements imposed on social workers with whom the lawyer may be working in connection with representation.[104]

MR 1.6(b)(7)

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

[104] Two ethics opinions which provide excellent guidance on the subject are: *Ethics Opinion 282 "Duties of Lawyer Employing a Social Worker Who Is Obligated to Report Child Abuse"* concluded as follows:

> The ethical dilemma faced by the lawyer, the client, and the social worker is not easily resolved, and the Rules do not appear to have contemplated the situation we confront. Given the lack of clarity in the relationship between Rule 1.6 and laws mandating reporting of child abuse and neglect by certain professionals, the lawyer's obligations under the circumstances discussed in this opinion are twofold: first, to inform his client of the possible implications of sharing information about child abuse or neglect with a social worker working for the lawyer; and second, to inform the social worker of the obligations imposed by [Rule 1.6].

New York City Bar 1997-2 (reiterates the proscription of disclosing confidential information to non-lawyers associated with the representation as in the case of social workers subject to mandated reporting of child abuse.) *See also Virginia Legal Ethics Opinion* 1844 (December 8, 2008)(addressing duty of Guardian at Litem (GAL) to investigate and disclose confidential information regarding child abuse under the 1.6(b)(6) concluding that rules and responsibilities of GAL come within the meaning of "law" and therefore permit such disclosure)

Disclosing Confidential Information To Address Conflicts of Interest When Moving to a New Firm or When Firm Undergoes Lawyer Personnel Changes

Whenever a lawyer moves between law firms, both the moving lawyer and the new firm have an obligation under the Model Rules to protect their respective current (Rule 1.7) and former (Rule 1.9) clients from any harm caused by their representation of other clients. To that end, all lawyers should have in place procedures to identify in litigation and non-litigation matters the persons and issues involved.[105] In order to determine whether a conflict exists in such circumstances, a lawyer by necessity would have to disclose some confidential information to the new firm and vice versa. For this reason, jurisdictions in which there was no express rule permitting limited disclosure for the purpose of identifying conflicts nevertheless have concluded that such disclosures were ethically permissible.[106]

Rule 1.6(b)(7) provides express permission to do so as long as the information necessary to determine the conflict does not involve disclosure of privileged information or information prejudicial to the client. Examples of prejudicial information might include: a corporate client's seeking advice on a corporate takeover that has not been announced; a person's consultation regarding the possibility of divorce about which the spouse has no knowledge; or a person's consultation about a criminal investigation that has not yet led to a public charge. In such cases, the lawyer would have to obtain the client's informed consent to the disclosure.[107] Rule 1.6(b)(7) also applies to proposed mergers of law firms or where a lawyer is considering purchasing a firm.[108]

In the immigration context, conflict issues may arise where a lawyer moves to a new firm. For example, a lawyer who had a solo immigration practice joins a large law firm. The law firm asks the lawyer to file an H-1B petition for a potential employee. As it turns out the lawyer has been doing I-9 compliance work for the potential hire's current employer. What, if anything, should she reveal to the company? Nothing in the rules requires disclosure unless an actual conflict arises. Normally, I-9 compliance work is separate from H-1B representation. However, disclosure of a problem with the employee's status or conduct learned in one matter may be disclosed to prevent harm to the other client**.**

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[105] *See* Comment 3 to Rule 1.7:

> To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule..... Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship.

[106] *See ABA Formal Opinion* 09-455 (October 8, 2009) (in a comprehensive analysis of competing obligations of duty of confidentiality and duty to avoid conflicts, prior to amendment adding (b)(7) exception, opinion concluded that lawyers have a need to and should be able to disclose confidential information on a limited basis because the model rules are "rules of reason" to be "interpreted with reference to the purposes of the legal representation and of the law itself," citing paragraph 14, Preamble and Scope.); *Texas Bar Opinion* 607 (7/11) (concluding that disclosure for purposes of conflicts checks for contemplated employment, permissible under duty of confidentiality exception that permits disclosure to comply with other Rule); *Kansas Bar Association Ethics Opinion* 07-01(3/1/07)(concluding disclosure for conflicts checks permissible though not expressly permitted under duty of confidentiality rule on basis that it is permitted under exception that permits compliance with other Rule). It should be noted that unlike many comparable state rules, *e.g.*, New York and Illinois, MR 1.6(b)(6) does not provide an exception to comply with any other "Rules." (*But see* MR 3.3 which specifically provides that disclosure may be required under that rule even if disclosure is not permitted under Rule 1.6.) *See discussion of State Variations below.*

[107] *See* Comment 13 to Rule 1.6.

[108] *See* Rule 1.17 regarding ethical obligation involving purchase or sale of law firm.

Rule 1.6(c)

> **Rule 1.6(c)**
>
> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Ignorance is no excuse!

Overview of Rule 1.6(c)

Rule 1.6(c) differs from all the other subsections in that it *requires* certain conduct, namely, that the lawyer make "reasonable efforts" to prevent inadvertent disclosure or unauthorized access to confidential information. Although Rule 1.6(c) imposes an affirmative duty on a lawyer to protect client confidentiality, the rule protects the lawyer as well. A lawyer who can show that she has made reasonable efforts to prevent inadvertent disclosure or unauthorized access to confidential information will not be penalized if improper disclosure nevertheless occurs.[109] We discuss below three basic categories under which confidential information may be revealed inadvertently or by another's action to gain unauthorized access to confidential information.

First, some inadvertent disclosures occur simply as a result of human error. A competent and conscientious lawyer may not update his client's address and may misaddress an envelope containing a copy of a filing, which results in disclosure to an abusive husband that his wife is seeking permanent residence through a VAWA self-petition as a victim of domestic violence. A lawyer may rely on his trusted paralegal to place confidential documents in the shredder only to discover the documents in a conference room visible to other clients meeting there.[110] A client who meets with a lawyer in his personal office may discover the names of several of the lawyer's clients by simply observing labeled files left in open view in the windowsill. Whether a lawyer could have prevented those improper disclosures through reasonable efforts will depend on the totality of the circumstances, including whether such confidentiality breaches constitute a pattern of conduct or if the lawyer had practices in place to reduce the likelihood of a recurrence of the breach.

One practice which increases the likelihood of unintended disclosure of confidential information or unauthorized access to confidential information is the client's use of his employer's computer to communicate with his lawyer about a legal matter. The employee client may be deemed to have waived the lawyer-client privilege if the employer has a stated policy of monitoring employees' electronic communications.[111]In such situations a lawyer who failed to instruct his client not to communicate via his employer's computer may be found to have violated Rule 1.6(c).[112] It would take little effort to advise the client about the dangers of unauthorized access to confidential information arising from use of his employer's facilities for lawyer-client communication. This, of course, would apply to the use of

[109] Comment 18: "The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure."

[110] On the question of proper disposal of closed client files, see *Texas Bar Opinion 627* (April 2013)(reiterating responsibility of lawyer to dispose of closed files in a manner designed to safeguard confidential information whether the files are maintained in hard copy form or electronically).

[111] *See e.g., Aventa Learning, Inc. v. K12, Inc.,* 880 F. Supp. 2d 1083(W.D. Wash. 2011)(where employer disclosed policy of monitoring employee's e-mails, employee had no reasonable expectation of confidentiality of communication with lawyer)

[112] *See ABA Formal Op. 11-459* (given risk that employer may monitor computer use and even employer issued smartphones, "a lawyer should ordinarily advise the employee client about the importance of communicating with the lawyer in a manner that protects the confidentiality of e-mail communications."

any workplace system, such as office fax machines, where the client may have no reasonable expectation of privacy.[113]

Second, other breaches of the duty of confidentiality may arise from the lawyer's reliance on independent contractors, such as domestic or foreign lawyers, or non-lawyers to provide legal or support services. This practice is commonly referred to as "outsourcing." The primary factors in determining whether a lawyer has used "reasonable efforts" to safeguard confidential information in that setting are the level of supervision available and employed by the lawyer, as well as the lawyer's due diligence in determining what outsourcing providers to hire in the first instance.

Lastly, in the age of electronic communication and storage of confidential information, a lawyer may not be able to rely solely on common sense and experience to limit inadvertent disclosure or unauthorized access to confidential information. The lawyer by necessity must have a basic understanding of how technology works and the risks of improper disclosure in order to be able to determine what efforts are reasonably necessary to safeguard confidential information in the first instance.[114] Even when a lawyer has determined that the technological safeguards he has chosen meet the "reasonable efforts" standard, he has a continuing duty, as technology advances and changes over time, to arrange for periodic review of the safeguards he has put into place.[115]

In determining what reasonable efforts to take in each of the categories discussed above, the prudent and conscientious lawyer must take into consideration other related model rules, namely Rule.1.1 (competency), Rule 5.1 (supervisory responsibility for another lawyer's conduct) and Rule 5.3 (supervisory responsibility for a non-lawyer's conduct).[116] Other state and federal laws governing electronic information also may require the safeguarding of confidential information.[117]

The fundamental principle to be observed is that as long as the method of communication or storage affords a reasonable expectation of privacy, the precautions will be satisfied.[118] A lawyer who is careless in the handling of documents, by definition would not be deemed to have used reasonable efforts to protect inadvertent disclosure.[119] The reasonableness of any expectation of privacy will depend on the sensitivity of the information and degree to which the privacy of the communication is protected by law or by a confidentiality agreement.[120]

As noted in Comment 18, other factors may include increased risks of disclosure if extra safeguards are not in place and the cost and ease of employing the safeguards to the lawyer and the client and whether using the safeguard might interfere with the representation in some way. For example, the

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[113] *ABA Formal Op.* 11-459, *supra*.

[114] *Arizona Bar Op.* 05-04 (2005)*(*where use of electronic information is concerned, an attorney must either have the competence to evaluate the nature of the potential threat to the client's electronic files and to evaluate and deploy appropriate computer hardware and software to accomplish this purpose, or if the attorney lacks or cannot reasonably obtain that competence, to retain an expert consultant who does have such competence.)

[115] *Arizona Bar Op.* 09-04 (2009)(in accessing the permissibility of installing an encrypted online file storage and retrieval system for clients, the Committee cited lawyer's ongoing responsibility to keep up with technological advances as another measure of competence).

[116] *See* Comment 18 to Rule 1.6(c).

[117] Comment 18 to Rule 1.6 refers to other related laws, but does not name them specifically. Rather the Comment impliedly advises that lawyers may be ethically required to familiarize themselves which such states or federal laws. (*see* Rule 1.1, competence). In particular, the Comment notes that "*state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, [are] beyond the scope of these Rules*."

[118] *See* Comment 19.

[119] *See, e.g., Statewide Grievance Comm. v. Paige,* WL 1833462 (Conn. Super. Ct. 2004) (lawyer's practice of reusing as scrap paper pages containing client confidential information violated Rule 1.6)

[120] *See* Comment 19, Rule 1.6.

safeguards might render a device or software too hard to use. The client may consent to the use of a particular method of communication or storage that makes inadvertent disclosure more likely, but the lawyer seeking such consent should make sure to advise the client of all the risks and consequences of using that method in order for the client's consent to be "informed."[121] Conversely, a client may require the lawyer to implement special security measures not required by Rule 1.6. The primary concern should always be that confidential information not be transmitted or made available to unintended recipients. We discuss areas in which "reasonable efforts" may require a significantly heightened degree of due diligence below.

Special Areas of Concern

Can a lawyer use the "Cloud" to store or transmit confidential information?

Lawyers who use an iPhone or other smartphone, web-based emails such as Gmail, Yahoo, or Hotmail, or services such as Dropbox or Google Docs in conducting their practice are using what has been termed "cloud computing." In each of the forgoing examples information is stored, through the use of special software, on a remote computer or server outside the physical location of the law office.

Based on the express wording of Rule 1.6(c) and the Comment 8 to MR 1.1, a lawyer who uses "the cloud" in any form to store client information must make reasonable efforts to safeguard against inadvertent disclosure or unauthorized access to the information.[122]

The obvious question is: how do you do it?

Guidance may be found, for example, in *New York State Bar Op*. 842 (September 10, 2010) which concludes that reasonable care covers several basic areas, which involve:

(1) obtaining assurance from the cloud computing service that it will preserve confidentiality and notify the lawyer if it is served with process to produce client information,

(2) determining that the provider has adequate security measures, policies and recoverability methods,

(3) obtaining available technology to guard against "reasonably foreseeable" data infiltration, and;

(4) determining the provider's ability to purge and transfer the data in the event the lawyer becomes dissatisfied with the provider.[123]

New Hampshire Bar Ass'n Ethics Advisory Op. 2012-13/4 lists issues a lawyer must consider in using a cloud computing service provider, among them, the reputation of the organization, the physical location of the servers and the privacy laws in effect at the location of the outside server (given that it

[121] *See, e.g., ABA Formal Ethics Op.* 11-459 (2011)(lawyer who uses electronic means, such as emails, to discuss substantive matters with a client must advise the client of the risks that a third party may gain access to such communications and take reasonable care to protect the confidentiality of the information by providing appropriate advice to the client.)

[122] *See Penn. Bar. Ass'n Formal Opinion* 2011- 200 (Comprehensive discussion of cloud computing which includes survey of other relevant ethics opinions from Alabama, Arizona, California, Florida, Illinois, Maine, Massachusetts, Nevada, New Jersey, New York, North Carolina, Vermont and Virginia, all of which allow client confidential information to be stored in what has been termed "the cloud" as long as the lawyer takes reasonable care to ensure that the information remains confidential and to employ appropriate safeguards to prevent inadvertent breaches or data loss or other unauthorized access); *See also ABA Map and Chart of Cloud Ethics Opinions Around the U.S.* at http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html)

[123] *See New York State Bar Op. 842* (September 10, 2010).

may be located outside the United States), and the details of the providers disaster recovery plan regarding the stored data.[124]

Further, a lawyer must decide if documents stored outside of the office (in the cloud) must be encrypted. Encrypting a document makes it unreadable to anyone accessing it that does not have the "key" to decrypt the document. Many encryption methods exist, including adding a password to the document in Microsoft Word or a PDF creator such as Adobe Acrobat and software applications such as BoxCryptor and DataLocker. There are no ABA ethics opinions on data encryption, except for ABA Opinion 11-459, also cited here at footnote 121, on the use of email to communicate with clients. In this opinion, the use of email encryption is not required but encouraged in certain situations.[125]

Many firms are now using laptop computers as full-time replacements for desktops PCs. Lawyers can take them to and from court, depositions, home, etc. Other lawyers are using smartphones or tablet computers to store and access data while on the road. However, this mobility also increases security risks. Portable devices may be lost, stolen or misplaced. The loss of the computing device is bad enough, but the loss of confidential client data is far worse. Accordingly, all lawyers, whether from larger firms or solo practitioners, must take steps to prevent unauthorized access to client data:

- Require strong passwords on all devices connected to your office network. Monitor and enforce this policy.
- Limit the number of people who can access client information stored on your network.
- Limit the types of information that can be stored on a portable device; encrypt any sensitive data and documents that physically reside on the device.
- Require all portable devices have enabled a device locator app or service should it be lost or stolen. If the device is not returned, then the data can be remotely wiped so as not to compromise confidential client data.
- Review the security policies regularly to make sure system integrity is maintained.
- Read the Terms of Service of any cloud service you engage to make sure they take reasonable measures to protect client data.

Although these suggested steps may appear daunting, a lawyer should be able to get the answers to these questions in promotional material provided by the service provider and, of course, by carefully reviewing the terms and policies incorporated in the contractual agreements for employing the services of the company. To the degree that the lawyer is not able to obtain the necessary assurances either on the basis of those writings or a specifically drafted "side letter," a prudent and conscientious lawyer would be wise to select another company.

Further, given that many lawyers may not have sufficient technical knowledge to make a reasoned decision, the prudent and conscientious lawyer should seriously consider consulting with a technical

[124] *See New Hampshire Ethics Op.* 2012-13/4.

[125] *ABA Ethics Op.* 11-459 ("A lawyer sending or receiving substantive communications with a client via e-mail or other electronic means ordinarily must warn the client about the risk of sending or receiving electronic communications using a computer or other device, or e-mail account, to which a third party may gain access. The risk may vary. Whenever a lawyer communicates with a client by e-mail, the lawyer must first consider whether, given the client's situation, there is a significant risk that third parties will have access to the communications. If so, the lawyer must take reasonable care to protect the confidentiality of the communications by giving appropriately tailored advice to the client.") *See also* ABA Law Practice Management article, Erik J. Heels, *How to Back Up Your PCs and Macs: An Obsessive Guide for the Small Law Firm, citing AZ, MASS, NEV, NJ AND VT ethics opinions (2003 to 2006)* [*http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/OBSethicsfyi.html*].

expert, preferably one that is familiar with the ethical obligations imposed on lawyers, in particular, the duties of confidentiality and competence.

What are a lawyer's obligations to prevent disclosure of confidential information in metadata? What is metadata anyway?

Many lawyers who use computer software to create, transmit or store a document may not be aware that there is information contained in the document that is not be visible on the screen or in the printed document. Such hidden information has been referred to as "metadata." Some hidden information, such as the date an electronic file was created or later edited, may not seem important initially, but can become so. Other information, such as the document's authorship, edits reflected in prior drafts, commentary and revisions, may indicate work-product, strategy and other confidential information harmful to the client or the matter, which are otherwise protected under Rule 1.6.

The duty to employ reasonable efforts to prevent inadvertent disclosure of metadata arises from the fact that there are technological tools specifically designed to search for and reveal metadata. Based on the assumption that such tools will be used by the recipient, lawyers who transmit electronic documents to third parties have a duty to ensure that no confidential information is revealed in embedded metadata.[126]

As discussed, the duty arises not only from the "reasonable efforts" component in Rule 1.6(c), but also the general duty of competent representation under Rule 1.1. Since most lawyers today rely on electronic communications—albeit in varying degrees—in their day to day practice, competency with respect to metadata requires that a lawyer obtain a basic understanding of the risks of revealing metadata and the technology available to prevent it or to enlist competent technical support personnel to accomplish the task of removing or blocking access to metadata.[127] Unless there has been agreement otherwise, lawyers should assume that a recipient will search for metadata.[128] To avoid this problem, convert a Word document or file to PDF format to eliminate much of the metadata, or try a metadata stripper, such as the Metadata

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[126] *See, e.g., Amersham Biosciences Corp. v. PerkinElmer Inc.,* No. 03-4901 (JLL) 2007 WL 329290 (D.N.J. Jan. 31, 2007)(law firm waived lawyer-client privilege and work-product protection concerning client e-mails by producing compact disk containing information in hidden metadata files and files); *Arizona Ethics Op.* 07-03 (2007)(lawyer must take reasonable precautions to prevent communication of metadata containing client information); *Colorado Ethics Op.* 119 (2008)(lawyer must take reasonable care to avoid disclosing metadata with confidential information to a third party); *Minnesota Ethics Op.* 22 (2010)(lawyer must act competently to prevent unauthorized disclosure of confidential information contained in metadata of electronic documents); Penn. Bar Ass'n Formal Op. 2009-100(transmitting lawyer has duty of reasonable care to remove unwanted metadata from electronic documents before sending them to an adverse or third party), *See ABA Map and Chart of Metadata Ethics Opinions Around the U.S.* *http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html*.

[127] *See Oregon Ethics Op.* 2011-187 (in addition to citing duty, suggests specific methods to safeguard against access to metadata including 'utilizing available methods of transforming the document into a non-mailable form, such as converting it to a PDF or "scrubbing" the metadata from the document prior to transmittal'); *ABA Formal Op.* 06-552 (lawyer may be able to limit transmission of metadata by "scrubbing" or sending document in a paper, facsimile or scanned format that does not contain metadata, noting that all states that have considered the issue have concluded that a lawyer has a duty to exercise reasonable care to prevent inadvertent disclosure of metadata).

[128] Jurisdictions differ as to whether a receiving lawyer may ethically search for data in electronic documents or whether he is required under the rules to notify the sender that he has received a document which inadvertently included metadata. The justification for the latter is based on MR 4.4(b) which provides:

> (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Compare ABA Formal Ethics Op. 06-442(2006) (receiving lawyer may ethically look for and use metadata received from an opposing party); *Florida Ethics Op.* 06-02 (2006)[Rule 4.4(b) prohibits lawyers from trying to obtain any information from metadata unless it was purposely and knowingly supplied]; Penn. Bar Ass'n Formal Ethics Op. 2009-100 (receiving lawyer has duty under Rule 4.4(b) to notify transmitting lawyer if an inadvertent metadata disclosure occurs).

Assistant. Newer Windows operating systems (Windows 7 and 8) do a better job of managing metadata than prior versions, but it is still best to convert to PDF format.

What are a lawyer's obligations regarding the inadvertent creation of a prospective lawyer-relationship through use of a professional website?

The duty of confidentiality imposed under Rule 1.6 applies to current, former or prospective client relationships. For this reason a lawyer must be clear to avoid any situation in which a lawyer-client relationship is created inadvertently. One example would be the inadvertent creation of a prospective lawyer-client relationship based on the lawyer's interaction with someone about representation resulting from a "visit" to the lawyer's website. This is so because unlike an unsolicited telephone call from a person seeking representation, in which the lawyer may screen the call or exercise some control over the nature and amount of information provided, the lawyer may have no control over the information that a visitor chooses to disclose in an unsolicited email via the lawyer's website. Essentially, as soon as the lawyer opens the e-mail, he has received the information and may now be under a duty to keep the information confidential.

When a website is silent or even ambiguous as to how the lawyer will handle online inquiries or other communications from a visitor, the lawyer is at risk that the visitor may reasonably believe that any communication which includes confidential information to the lawyer sent via the website will be kept confidential in the same manner as confidential information discussed in a give-and-take meeting with the lawyer.[129] A lawyer may clarify any ambiguity created by the use of a website for marketing purposes by providing a disclaimer in the website limiting the lawyer's obligations regarding treatment of confidential information.[130]

However, if the disclaimer is not clear and unambiguous or otherwise understandable to an unsophisticated lay person, it may not be sufficient to relieve the lawyer from the obligation to maintain the confidentiality of the information submitted.[131] At least one way of trying to demonstrate that the disclaimer has been read and understood by the visitor would be conditioning any email communication via the website to a "click check" that the visitor agreed to the terms of the disclaimer.[132] When a website specifically invites submission of information by those seeking representation by providing an electronic form which asks the client for information about the matter at issue, it is more likely that the visitor will be deemed a prospective client. If the form simply asks for only the visitor's contact information, whether a prospective client relationship will be established depends on how the lawyer responds.[133]

Because the number of visitors to a lawyer's website will likely far exceed other forms of interaction, lawyers who are in doubt about disclaimers posted on their websites should consult with a

[129] *See, e.g., Mass. Bar Ass'n Op.* 07-01 (lawyer receiving unsolicited emails from visitor containing information --without effective disclaimer—would be obligated to hold information confidential because firm could have set conditions on flow of information from visitor in the first instance)

[130] *See, e.g., Arizona State Bar Op.* 02-04 (2002)(lawyer's website offering email links should include disclaimers indicating whether or not email communications will be treated confidentially);

[131] *See, e.g., California Formal Ethics Op*. 2005-168 (providing a detailed hypothetical of a disclaimer that was deemed insufficient, an email submitted via link to firm's Web site could not be disclosed, notwithstanding disclaimer that it would not create "confidential relationship" when disclaimer was "potentially confusing to a lay person.")

[132] *Id.*

[133] For a comprehensive discussion of ethical obligations that a lawyer should address in considering the content and features of their websites, including interaction with visitors, see *ABA Formal Opinion* 10-457 (2010)(lawyers who respond to website initiated inquiries about legal services must take steps to provide full and clearly understood disclaimer, which includes advice to limit information provided by visitor, and to carefully craft any response to the visitor).

professional responsibility lawyer or seek assistance from local bar associations for recommended language, at a minimum.

What is the lawyer's obligation regarding the inadvertent creation of a current lawyer-relationship through use of other social media:

We have discussed above how a "prospective" lawyer-client relationship may be created through a visitor's interaction with a lawyer via his website and the duty of confidentiality which then attaches. Current lawyer-client relationships, which trigger the duty of confidentiality, also may be created through website initiated email contacts, as well as other Internet related interactions, such as "chatrooms"[134] or "listserves."[135]

The model rules do not define the phrase "lawyer-client relationship," but under common law a lawyer-client relationship which triggers the lawyer's ethical obligations to the client, including the duty of confidentiality, is formed when the client reasonably believes the lawyer is representing his interests and/or providing him with legal guidance.[136] The client does not have to pay the lawyer any fees; the lawyer does not have had to spend extensive time with the client; and, the client does not have to sign a written agreement to employ the lawyer. Simply put, a lawyer-client relationship may be inferred from the circumstances. If a person comes to the lawyer for legal advice through any medium and in any setting, showing a desire, express or implied, for representation, and reasonably believes he is getting legal advice from the lawyer, a lawyer-client relationship will be established.[137]

When a lawyer provides legal advice pertaining to facts disclosed by the visitor to the chatroom or the questioner on a Listserve, a lawyer-client relationship may also be inferred. That of course would then trigger the lawyer's duty of confidentiality.[138] It may also create an impermissible conflict of interest if the lawyer is currently representing or previously represented the visitor's adversary.

As in the case of prospective clients, the use of a disclaimer stating that no lawyer-client relationship has been created by the interaction will be effective only if it is reasonably understandable, properly placed and not misleading in that it fully explains the limitations applicable to the interaction. However, since a chat room or Listserve, by definition, promotes interaction between people, lawyer's disclaimer may be rendered void if the lawyer's responsive communications or other acts are inconsistent with the disclaimer. The lawyer may not realize that a lawyer-client client relationship has been created in discussing details of a client's matter on-line. While that scenario may seem implausible, the prudent and conscientious lawyer must exercise the greatest restraint before clicking the send button on certain social media applications, as discussed next.

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[134] A Chat room is a "[w]eb site, part of a Web site, or part of an online service such as America Online, that provides a venue for communities of users with a common interest to communicate in real time." *http://searchsoa.techtarget.com/definition/chat-room*.

[135] "Listserve ...include[s] an electronic mail servicing system, similar to or including LISTSERV, which allows messages to be sent and retrieved by members of a group. The Listserve would permit persons to post messages and responses similar to a bulletin board service (or BBS)." *New Mexico Ethics Op.* 2001-1.

[136] *Restatement of the Law Governing Lawyers §14. Formation of a Client-Lawyer Relationship*;

[137] *See, e.g., Attorney Grievance Committee v. Shoup,* 201 P.2d 442 (2009)(By talking too much with a friend about his legal problem and making specific statements about what should be done, a lawyer can give the reasonable impression that he is providing legal advice to the friend, thereby creating a lawyer-client relationship).

[138] *See, e.g., Philadelphia Ethics Op.* 98-6 (1998)(in cautioning lawyers about chatrooms, lawyer should keep in mind that in the course of an interaction with any person on the Internet, a lawyer-client relationship may be formed which by definition includes an expectation of confidentiality.); *New Mexico Ethics Op.* 2001-1(dialogue begun on Listserve may create lawyer-client relationship, triggering duty of confidentiality which requires lawyer to protect the information conveyed by party)

How is the lawyer's duty of confidentiality affected by his participation in or use of social media in matters other than the inadvertent creation of a lawyer-client relationship?

We have already discussed the risks of inadvertent creation of prospective and current lawyer-client relationships arising from a lawyer's use of social media for marketing or other professional purposes. A lawyer's use of social media may also create risks of inadvertent disclosure of confidential information through the use of hypotheticals or other scenarios in which improper disclosure may occur, but on a much larger scale. Because of the widespread participation in social media by millions of people, a lawyer must be particularly careful.[139] For example, if a lawyer wishes to discuss—on his website, blog or a listserve—matters he has handled, he should err on the side of caution by obtaining the client's informed consent.

Another potential ethical issue relating to social media involves the permissibility of a lawyer obtaining or using a social media user's information. As a preliminary matter, while a lawyer, like anyone else may obtain public information available on social media, a lawyer may not engage in deception to obtain such information.[140] That ethical prohibition does not, however, apply to others.

Accordingly, a lawyer who uses social media must be mindful of the fact that a third party—whether a lawyer or not—may attempt to gain access to information on the lawyer's social media application, as well, by use of a false alias or other fraudulent method.[141]

How is the lawyer's duty of confidentiality affected by outsourcing legal or support services?

Many lawyers call on the services of lawyers or non-lawyers as outside contractors to provide support services. Such contractors are increasingly used by immigration firms on employer-based cases to reduce costs on higher volume matters like H-1B filings or labor certification applications for corporate employers. Immigration lawyers may need to collaborate with foreign lawyers on EB-5 cases to document the source of funds used for the investment and address foreign tax issues. Further, many immigration practices have experience outsourcing translations, credential evaluations, and related non-legal work to outside agencies. In removal cases, lawyers hire expert witnesses for asylum on country conditions and for cancellation of removal cases requiring findings of medical, psychological, or economic hardship to family members. In each of the above examples the lawyer may need to reveal confidential information; however, under Rule 1.6(c) she must make reasonable efforts to prevent inadvertent disclosure or unauthorized access to the information.

Outsourcing tasks to lawyers and non-lawyers, whether located in the United States or abroad, implicates a number of ethical duties in addition to the duty of confidentiality under Rule 1.6.[142] First, no

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[139] As discussed in the context of proper use of hypotheticals, a lawyer must take into consideration the increased ease of access to public information available on the Internet. In *Office of Lawyer Regulation v. Peshek*, supra at note 27, in which lawyer violated the duty of confidentiality by discussing her experiences as a public defender on a Blog without disclosing the client's identity, the information was sufficient to identify the client using public sources. There the lawyer did not reasonably foresee the possibilities of inadvertent disclosure.

[140] *See, e.g., New York State Bar Ethics Op*. 843 (September 10, 2010)(lawyer may and should access information publically available on social websites, but is ethically not permitted to do in the context of deceptive "friending"); *Philadelphia Bar Assoc.* 2009-2 (2009)(lawyer may not ask assistant to friend a witness without disclosing reason for request or that assistant works for lawyer);*Oregon State Bar Legal Ethics Comm.* Op. 2103-189 (lawyer cannot use an alias to access user's non-public information, unless lawyer is otherwise engaging in legitimate covert investigation into unlawful activity, which under recent Oregon amendment to rules of professional conduct is permissible under new Rule 8.(4)(b); but conduct may implicate Rule 4.3 concerning contact with represented persons).

[141] *See* Leslie A.T. Haley, Haley Law PLC, *Electronic Communications & Information Storage—and Ethics* (suggesting that lawyers, among other risks, need to be concerned about using social media to comment on pending trials, revealing case results without a disclaimer, recklessly criticizing judges, practicing law in a jurisdiction in which the lawyer is not admitted or receiving messages that contain malware or illegal materials.) [available on-line].

matter who works on a client's legal matter, the lawyer retained by the client in the first instance has the ultimate responsibility for providing competent legal services to the client under Rule 1.1. This would include complying with the supervisory responsibility imposed on lawyers under Rule 5.1(supervisory responsibility lawyers) and Rule 5.3 (supervisory authority over non-lawyers).[143] Thus, if the individuals handling the outsourced work are not competent or otherwise mishandle the work, the supervisory lawyer may be liable. Lawyers who outsource work to foreign lawyers or non-lawyers must also be mindful of the possibility of aiding the unauthorized practice of law in violation of MR 5.5. Outsourcing work may also create conflict of interest issues under Rule 1.18 (prospective clients), Rule 1.7 (current clients) and Rule 1.9 (former clients). To the degree clients are charged separately for the outsourced services, the fees must be reasonable and otherwise comply with Rule 1.5**.**

As also noted in a number of ethics opinions and in accordance with Rule 1.6(a), as a preliminary matter, if the outsourcing assignment will require the lawyer to disclose client confidences, the lawyer should obtain the client's informed consent in advance.[144] Part of the information that the lawyer should provide to the client to obtain consent may be the lawyer's opinion/assurance that the confidentiality of the information will be protected by the outsourced recipient of the information.[145]

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[142] *See ABA Formal Opinion* 08-451 (August 5, 2008); *New Hampshire Advisory Op.* 2011-12/5; as to non-lawyers only, see Comments 3-4, MR 5.3.

[143] With respect to the responsibilities of Partners, Managers, and Supervisory Lawyers within a firm, MR 5.1 provides that:

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

With respect to supervisory responsibility for non-lawyers, MR 5.3 provides that:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[144] Permission to disclose confidential information to an outsourced lawyer or non-lawyer for the purposes of providing legal support services does not come within the listed exceptions in Rule 1.6(b). Unless the circumstances clearly supported the conclusion that authorization was implied, the lawyer must seek the client's informed consent. See *New York City Bar Op. 2006-3; ABA Formal Op.* 08-451 August 5, 2008); *Florida Bar Ethics Op.* 07-2 (January 18, 2008). *But see Colorado Bar Formal Ethics Op.* 121 (June 16, 2009)(taking a less conservative approach, disclosure required only if outsourcing deemed a "significant development" in the representation).

[145] *See New York City Bar Opinion* 2006-3 (discussing the circumstances under which a lawyer may ethically outsource legal support services).

Where the lawyer intends to outsource work to a paralegal service, the lawyer should obtain information from the service on the confidentiality of their work flow processes, including storage and transmission of electronic data and paper documents. Further, the lawyer should obtain a confidentiality agreement with the paralegal, as well as consent from the client to allow outsourcing that is beyond the direct physical oversight of the lawyer.[146]

Where a lawyer intends to outsource work to a foreign lawyer, which may include the services of foreign non-lawyers as well, the requirement of Rule 1.6(c) to make reasonable efforts to prevent inadvertent disclosure and unauthorized access to confidential information requires a heightened level of due diligence and supervision. A lawyer should obtain background information about the foreign lawyer or non-lawyer by conducting reference checks, interviewing the lawyer or non-lawyer (or any non-lawyer intermediary involved) in advance by telephone or Webcast, inquire about the confidentiality rules, if any, governing the foreign lawyer, investigating the security of the premises in which the work will be done and the computer network, and communicating periodically with the foreign lawyer or non-lawyer throughout the assignment**.**[147] The lawyer would also need to do a conflicts check by determining if the foreign lawyer or non-lawyer is currently doing work or has done work that is adverse to the lawyer's client and determining if the foreign employer of the non-lawyer has an appropriate conflicts checking procedure in place.[148]

How is a lawyer's duty of confidentiality affected by her reliance on other lawyers or non-lawyers, under her supervision, to perform legal or support services?

Rules 5.1 and Rule 5.3

We discussed above the special concerns arising from a lawyer's outsourcing of legal related work, in part, arising from the fact that a lawyer may be held responsible for the work of others over whom the lawyer has supervisory responsibility, or other related rules. To that extent, a lawyer must be mindful of the provisions under MR 5.1 and MR 5.3 which we cite at note 145.

Basically, a lawyer who directly employs other lawyers and non-lawyers as part of his office staff must take the same precautions discussed in the above areas to prevent the disclosure of confidential information. This at a minimum would require the lawyer to discuss the duty of confidentiality with his staff and have procedures in place to insure that his staff observes the same protocols as the lawyer would in handling confidential information.

In the immigration context, non-lawyer paralegals may perform services that involve direct client communication on behalf of the lawyer. Paralegals may conduct initial intake interviews with a prospective or retained client, prepare drafts of appropriate USCIS forms or filings for submission to immigration court, review and organize documents for inclusion with the forms and field phone calls from clients seeking information about their cases or contact clients to obtain needed information. As part of the immigration lawyer's supervisory or managerial requirements under Rule 5.3, the paralegal should be provided with introductory training as to confidentiality, which should include a discussion of the types of information which are deemed confidential as well as the very limited situations in which information may be disclosed. The lawyer should also advise her paralegals that under MR 5.3 she could be held responsible for their breach of confidentiality and that the paralegals risk termination of employment for

[146] *See ABA Formal Ethics Op.* 08-451 (minimizing risk of improper disclosure may include obtaining written confidentiality agreement).

[147] *Id.* (when dealing with an "intermediary" suggesting in some instances a "personal visit to the intermediary's facility, regardless of its location and difficulty of travel, to get a firsthand sense of its operation and professionalism of the lawyers and non-lawyers it is procuring.")

[148] *Id.*

violations of client confidentiality rules. Depending on the circumstances an immigration lawyer may consider preparing a paralegal manual which includes information on confidentiality.[149]

Other appropriate supervision would include regular and frequent meetings with paralegals to discuss the matters they are working on and respond to any questions or concerns as to confidentiality (or other relevant issues). The lawyer must carefully review all of the paralegal's written work. By carefully reviewing all written work, the immigration lawyer will also be in a better position to evaluate the paralegal's overall competence and grasp of the principles underlying the duty of confidentiality. Notably, a lawyer's failure to review and approve a paralegal's written work would also implicate MR 5.5 (aiding the unauthorized practice of law by the paralegal); MR 5.3(failure of supervise non-lawyers) and MR 1.1 (lack of competence), among other possible ethical violations.

Immigration lawyers also rely on the services of interpreters and translators who may not be employed by the lawyer, but in effect are supervised by the lawyer. They too should be counseled on confidentiality and where appropriate, as in cases where the immigration lawyer has no previous experience with the person, should be required to sign confidentiality agreements.

D. HYPOTHETICALS

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: Lawyer's Blog, Don't Spill the Milk!

An immigration lawyer writes this blog post about an I-9 inspection of large dairy client as a warning to other employer clients:

"I was recently hired to represent a large South Dakota dairy in an employer sanctions case. The dairy was surprised to receive a notice of inspection of its I-9 forms. Rather than being surprised, the dairy should have been prepared for what has become a standard feature of federal immigration enforcement policy. Because the dairy was surprised, and not prepared, it now faces substantial fines in the six figures for what the Department of Homeland Security's Immigration and Customs Enforcement (ICE) considers one of the most serious violations of employer sanctions laws, not having I-9 forms for more than 100 of its current and terminated employees.

The dairy should not have been surprised to receive the notice of inspection. ICE has been auditing other agricultural employers throughout the Upper Midwest. This employer, in particular, should have known better because of its large workforce, industry knowledge, and strong record of regulatory compliance in other areas. Through I-9 audits, ICE has been requesting not only I-9 documentation, but also payroll records, copies of immigration filings, Social Security Administration communications, information on independent contractors, and tax records. Employers are required to have an I-9 form on file for all employees to verify identify and authorization to work in the United States, or they face substantial civil fines. In determining penalty amounts, ICE considers the number of violations and five factors to enhance or mitigate fine amounts, including the size of the business, good faith efforts to comply, the seriousness of

[149] The prudent and conscientious lawyer may find it helpful to consult with counsel as to the legal and ethical ramifications of preparing an office manual.

> the violation, whether the violation involved unauthorized workers, and history of previous violations.
>
> If the government wants to inspect your I-9 forms, you should call your immigration lawyer immediately. If you have not yet been audited, you should take steps in advance to protect yourself through training and by doing internal audits."

The above scenario concerns the potential inadvertent disclosure of confidential information on social media in the course of revealing information about a real client even when being careful not to disclose the client's name or location.

Analysis

Is the Dairy a Client to Whom the Lawyer Owes a Duty of Confidentiality?

In this scenario, the lawyer disclosed that the dairy is a client. The presumption is that the dairy is still a client, but even it was a former client, the duty of confidentiality remains the same.

Does the lawyer have confidential information which may not be disclosed without the client's consent or there is implied authorization?

Yes. Here the confidential information is not only the basic existence of a lawyer-client relationship, but also detailed information concerning what happened in the matter. In the first paragraph of the blog, the lawyer reveals that the client was "surprised" by the notice of inspection of its I-9 forms, that the client was not prepared, that it did not have the I-9 forms available timely, that it was now subject to fines in "six-figures", and that it has employed over 100 presumably foreign workers. In the second paragraph, the lawyer also described the dairy as having a large workforce, industry knowledge, and a strong record of regulatory compliance in other areas. The lawyer was also openly critical of the Dairy for not being prepared. Presumably, the lawyer believed his message about obtaining good legal help – and hopefully his——to avoid such problems would be more effective if she discussed a real case. She is probably right. However, under these facts has she disclosed too much?

Do the facts about the dairy case revealed in the lawyer's blog amount to the unauthorized disclosure of confidential information?

This is a fact sensitive inquiry and turns on the question of whether the facts disclosed under the circumstances would make it reasonably likely that a reader would discover protected confidential information. Here the lawyer discloses upfront that the client is a dairy with a large workforce. If there are 100 dairies in the area all with large workforces, a reader would be less likely to learn the identity of the client without more information. If there are only two dairies, the likelihood that a reader could discover the client's identity would be increased. If the lawyer did not identify the client as a "dairy" altogether, the likelihood that a reader would discover the client's identity would be decreased. However, if the lawyer was known in the area for representing only dairies that information might tip the scale back the other way. The additional pieces of information disclosed by the lawyer taken together also increase the likelihood that the lawyer has revealed information that would lead to the discovery of protected confidential information. As noted in Comment 4 to MR 1.6, the prohibition against disclosing confidential information:

> also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no

> reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

As reflected in the above comment, Rule 1.6 may be violated if the lawyer reveals facts that create a "reasonable likelihood" that the identity of the client or the situation will become known. In the above example, that could easily be the case. Absent the client's informed consent, which should include the client's review of what the lawyer intends to publish, a lawyer would be taking an unnecessary risk of violating Rule 1.6.

In trying to understand what kind of information may be available to a reader that would help him discover the identity of the lawyer's client, consider the possibility that the day after the lawyer's blog post, the local newspaper covers the story of the I-9 inspection at the same dairy, giving its name, but not the other details as to the fine or number of violations. In such a situation a reader certainly could put two and two together and figure out that the lawyer's blog referred to that dairy. The fact that the newspaper story appears after the lawyer publishes his blog may not excuse a disclosure violation. Lawyers may not also disclose information that is otherwise publically available. Because a lawyer cannot easily predict how information discussed in hypothetical form will lead to discovery of otherwise protected information, a lawyer who publishes such information without his client's consent does so at his peril.

What are best practices?

If a lawyer really wants to talk about her client's case on a blog because the facts are integral to the advice to be offered and may help generate new business, she should get the client's informed consent. Otherwise, the lawyer runs the risk that the facts disclosed are reasonably likely to lead to discovery of confidential information. In this scenario, without client consent, the better practice would have been only to discuss in general terms the risks for companies that have large workforces of foreign workers and who do not keep proper I-9 records in anticipation of a notice of inspection. The lawyer could safely describe the potential fines and even criticize management of such companies as long as there is no suggestion that she is talking about an actual company. The lawyer also could have safely disclosed that she has had clients who have been subject to significant fines because they have not taken appropriate steps to maintain I-9 forms.

Hypothetical Two: John and Maria, Married Couple: But for How Long?

John, a U.S. citizen, and his foreign born wife Maria hire you to handle her marriage-based application for permanent residence. You agree to prepare a one-step application that includes John's I-130 petition and Maria's I-485 application for adjustment of status. During your intake interview, they both clearly state this is their first marriage. Before you begin work on the case, you explain that you will be representing them jointly because of their shared objective of permanent residence for Maria, and they sign a written representation agreement acknowledging potential conflicts of interests and agreeing to dual representation. In the dual representation paragraph of the agreement, the clients also acknowledge that any information either client provides to the lawyer will be shared with the other client. The agreement indicates that in the event of an actual conflict, the lawyer may be required to withdraw from the representation altogether. While you are preparing the case, but before you file the application, Maria calls to tell you that she has something to disclose, but that she does not want anyone else, especially John, to know. She was briefly married before. She is embarrassed about the earlier marriage and mortified about lying to John and his family about never having been married before. She insists that you not tell John under any circumstances. You explain in response that this earlier marriage needs to be disclosed as part of her application, regardless of how long it lasted or where it occurred, and that not disclosing the marriage would be a misrepresentation, leading to more serious problems. You also explain that she will need to get a divorce decree or other documentation to confirm that her previous marriage was legally terminated before she married John, and that John will need to know because it will be part of the application and addressed during the adjustment interview. Maria is very upset, and she remains adamant that you not tell John. In fact, she insists that you stop working on her case. After hanging up with Maria, John calls to ask you when the application will be filed.

This scenario concerns the conflict between a lawyer's duty to apprise his client of all information relevant to his case, as part of the overall duty of loyalty to the client [as reflected in Rule 1.4(b)] and the duty of confidentiality to his client [as reflected in Rule 1.6]. As discussed more fully at pp. 20-25, when a lawyer and his clients agree to joint or dual representation, they must agree that the lawyer owes both these separate duties to each of them. In order for the lawyer to represent each of them there can be no secrets between the two clients as far as what they tell the lawyer or what the lawyer otherwise learns that they need to know; and the lawyer cannot withhold information from one client to the other merely because the one client makes that request. In this fact pattern, the lawyer is faced with competing duties that have created a conflict that may not be resolvable.

Analysis

Because the duties of loyalty and confidentiality are owed to the client, who is the client here?

John and Maria's interests in obtaining permanent residency for Maria based on her marriage to John are aligned. They want the same thing. Here, they are both the lawyer's clients. Under these circumstances, a lawyer representing both John and Maria jointly will have no problem being loyal to both because both John and Maria would want the lawyer to provide them with all the information necessary to make informed decisions about how to proceed and each would understand, accordingly, that there can be no secrets between them. Of course there is always the possibility that their interests may diverge in the event of financial or marital problems, for example. If so, the divergence of interest may create a problem for the lawyer.

Given the possibility that their interests may diverge, should the lawyer ask John and Maria to agree to an "advance conflict waiver"?

The lawyer apparently anticipated the need for such a waiver and as reflected in the above scenario John and Maria signed a written agreement agreeing to dual representation. The scenario does not explain what the agreement provided as to the lawyer's ability to continue to represent both, one or neither party in the event of an unresolvable conflict. This creates a problem for the lawyer if he is discharged or withdraws.

May the lawyer honor Maria's request that he keep confidential from John information that she was previously married?

It depends. If he is going to continue representing both of them, the lawyer owes the same duty of loyalty to John and Maria. That duty requires the lawyer to provide information that the client needs in order to make informed decisions about his legal matter, here, pursuit of the marriage-based permanent residency. Putting aside that John would want to know that his current wife kept a prior marriage from him, John would also have to know that Maria's prior marriage must be reported in the papers submitted to the USCIS and the failure to do so would amount to a fraud on a tribunal. Because the lawyer may not honor Maria's request he would have to resign from representing both John and Maria since their interests are adverse and there is an unresolvable conflict.

Does Maria's discharge of the lawyer have an effect on the lawyer's duty of loyalty and confidentiality of either John or Maria, or both?

Since Maria is a client, she can discharge the lawyer from representing her. But, in the normal course, a lawyer owes the same duties of confidentiality to a former client. Moreover, a lawyer may not represent a current client in a matter that is substantiality related to the former client's matter where the interests are adverse without informed consent of each client. The scenario is silent as to Maria's intentions. We do not know if she intends to forego pursuit of the marriage-based petition or if she intends to hire her own lawyer who will owe the duties of loyalty and confidentiality to her exclusively. But as long as John is still the lawyer's client. the lawyer is ethically bound to provide him with information he needs to know.[150] But he also cannot reveal confidences of his former client Maria. Because of this conflict as discussed above it would appear that the lawyer must withdraw from the representation entirely.[151]

Even if the lawyer withdraws from the representation, is the lawyer ethically permitted to disclose to John the confidential information that Maria revealed to him?

No. Since Maria is a former client he owes her the same duty of confidentiality as if she were his current client. He cannot reveal the information without her informed consent and it is clear that she will not give him that consent. The dual representation agreement only works to the point when the parties interests are aligned. Here they are not and since Maria has instructed John to keep her prior marriage

[150] If John had agreed in advance that Maria would not share certain information with him, John cannot then withdraw consent to that waiver and demand that Maria share that information with him. The power to veto should only rest with the client who has agreed to share her information, but then decides against sharing that information.

[151] Under MR 3.3, if Maria's failure to disclose her prior marriage in the married-based petition would constitute a fraud on or material misrepresentation to a tribunal (here, the USCIS), the lawyer might be required to disclose the omission to the tribunal. A misrepresentation is only material if it can alter the outcome. If Maria did not obtain a divorce prior to marrying John, this would be a material misrepresentation. If she did then her marriage to John is legally valid, and the failure to disclose the prior marriage even though required might not be deemed a fraud on the tribunal. In any event, since the lawyer has not filed any papers with the USCIS yet, MR 3.3 would only apply if the omission were deemed a material misrepresentation and lawyer "knew" that Maria intended to go forward with the omission after obtaining new counsel.

confidential, it is impossible for the lawyer to represent the best interests of each client at the same time[152]

What information, if any, is the lawyer ethically permitted to disclose to John?

The lawyer may only advise John that he has to withdraw from the representation because of an unresolvable conflict of interest caused by the now competing duties of loyalty and confidentiality owed separately to John and Maria.

Hypothetical Three: Joe and Alpha Corp. - Breaking Up is Hard to Do!

Joe, an H-1B worker, and Alpha Corp, a small privately owned company, hire you to prepare and file an employment-based permanent residence application for Joe. Alpha has experienced significant growth. As a private company, it does not want its employees to know any of its confidential financial information. You discuss dual representation and have Joe and an officer of Alpha Corp sign an agreement disclosing potential conflicts and acknowledging that you represent both parties. The agreement provides that in the event of a conflict the lawyer will have to withdraw from representing Joe, but will continue representing Alpha Corp. Alpha has instructed you not to provide Joe with access to confidential financial information that will be disclosed in the I-140 petition to prove the company's ability to pay the required salary. While the company's financial information is necessary for the success of its petition on his behalf, Joe does not need to see this information.

After the I-140 immigrant petition is approved, and the I-485 application has been pending for 180 days, Joe informs you that he is leaving Alpha. He requests a complete copy of his immigration file, and tells you that he intends to continue his employment-based application on his own under the portability provisions of the Immigration and Nationality Act for long pending permanent resident applications when the new job is in the same or similar occupation as the job for which the I-140 petition was filed.[153] Alpha, upset that Joe is leaving, most likely for a competitor, and already having been very protective of its confidential financial information, orders you not to give Joe any part of the immigration file, which includes the PERM application and the I-140 petition. In turn, Joe insists that he needs a copy of the labor certification application (PERM) and the I-140 approval notice to continue his I-485 application.

This is another example of the problems created in a dual representation scenario, but here the parties have agreed in advance that in the event of a conflict the lawyer will withdraw only from representation of the beneficiary, here Joe, the employee. The conflict manifests itself now in the context of the former client's (Joe's) request for access to file documents which may contain Alpha's confidential information.

[152] *See Wash. D.C. Bar Op. 296* (comprehensive analysis of problems of joint representation advising under the facts presented that under Wash. D.C. Rule 1.6 in effect at the time, lawyer cannot ethically reveal the employee's confidential admission that he falsified information used in visa application where there was joint representation but no agreement as to sharing of client information in retainer agreement). NOTE: Opinion affected by 2007 change in Wash. D.C. Rule 1.6(d) which permits but does not require a lawyer whose services were used to further a crime or fraud to reveal client confidences and secrets under certain circumstances to prevent the crime or fraud or to mitigate the harm caused by a client's crime or fraud. See Wash. D.C. Rule 1.6(d)

[153] *See* INA 204(j). The employee may also need the proof of filing the labor certification and the I-140 for purposes of obtaining H-1B extensions beyond the H-1B 6th year under §106(a) and 104(c) of the American Competitiveness in the 21st Century Act (AC 21).

Analysis

Because the duties of loyalty and confidentiality are owed to a client, who is the client here?

Up until the point that Joe decided to leave Alpha, in accordance with the written representation agreement, both Joe and Alpha, were joint clients between whom there were no confidences and the lawyer owed each a duty of loyalty.

Is it ethically proper for the lawyer to honor Alpha's request that Joe not have access to certain financial information that otherwise was provided in application forms signed only by Alpha?

Yes, because the lawyer owed Alpha the duty of confidentiality during the course of the representation and there was no competing demand from Joe that he have access to that information. It is unclear as to whether under these facts, Joe would have needed to see Alpha's financial records in order to make informed decisions about going forward with the employment-based permanent residency matter.

May the lawyer honor Joe's request for copies of documents from the entire file over Alpha's objection? May the lawyer honor's Joe's request to the extent of providing copies of the documents he would need to continue with the I-485, which do not contain Alpha's confidential information, notwithstanding Alpha's objection?

As for Joe's request for copies of the entire file, the lawyer as current counsel to Alpha may *not* honor Joe's request for copies of the entire file since portions of the file contain Alpha's confidential financial information. As discussed above, Joe never saw those documents in the first instance for that reason. The lawyer was not obligated to reveal that confidential financial information because Joe did not need that information to make an informed decision about going forward with the petition. He only needed to know that Alpha has sufficient resources to pay his salary which information the lawyer presumably provided. If Joe had asked to see Alpha's financial information during the course of the representation over Alpha's objection, that would have triggered a conflict of interest requiring the lawyer's withdrawal from representing Joe in accordance with the representation agreement.

However, since Joe is now a former client, under Rule 1.16(d), the lawyer may be required to provide Joe with the documents that do not reveal Alpha's confidential financial information, but which may assist Joe in pursuing legal permanent residency with another employer. The question of whether Joe is "entitled" to documents from his lawyer's file is a matter of common law.[154]

Even if a state's common law did not require return of the Labor Certification and I-140 Approval, a disciplinary authority could interpret the lawyer's refusal to provide the documents as conduct prejudicial to the former client after the representation has been terminated. In order to prevent or at least ameliorate the problem here, the lawyer representing Joe and Alpha, should have at the very outset, set forth what Joe would get if he left the employment. The prudent lawyer would have informed Alpha that it would be advisable for Alpha to provide documentation, even if the financial information was redacted, that would be necessary for Joe to pursue portability under INA 204(j). This would avoid burdens on Alpha in the

[154] Rule 1.6(d) provides: "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property ***to which the client is entitled*** and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law." [Emphasis added] *See Sage Realty Corp* v. *Proskauer Rose Getz & Mendelsohn,* 91 N.Y.2d 20 (1997)(where the New York Court of Appeals held that a client has presumptive access to the lawyer's entire file *except for two narrow exceptions, which include 1) documents which might violate a duty of non-disclosure to a third party,* and 2) "firm documents intended for internal law office review and use," such as the attorney's assessment of the case or preliminary impressions for internal purposes). [Emphasis added]

future if Joe claimed an interest in the labor certification and the I-140 under the portability or AC 21 provisions, even though these were filed by the employer. A waiver where the employee agrees to forego copies of filings that would assist him to port under INA 204(j) or to seek H-1B extensions under AC 21 may be viewed as a non-consentable waiver.

Hypothetical Four: John, the Lawyer and Maria, the Client: Can't We Be Friends?

John, an immigration lawyer, is quite comfortable using social media for personal and professional networking purposes. He has recently opened his own solo practice, after working several years at a large firm, and thinks it would be a good idea to ask one of his first new clients to be a "friend." John sends Maria Valdez, his new client, a standard Facebook friend request and she agrees. Maria is new to Facebook and she decides to send a Facebook friend request to John as well and he agrees.

The fact that John is an immigration lawyer with a recently opened solo practice is disclosed in his Facebook profile.

The above scenario raises the question of whether John's "friending" a client or agreeing to be a "friend" of a client creates the potential for the unauthorized disclosure of confidential information relating to his representation of Maria.

Analysis

Does John have a lawyer-client relationship with Maria?

This is the first question that John would have to ask himself before trying to decide if he owes Maria the duty confidentiality. Here, it is clear that Maria is a client and, therefore, under Rule 1.6(a) John has an affirmative duty not to disclose confidential information without Maria's informed consent or implied authorization. He also has a duty under Rule 1.6(c) to make reasonable efforts to prevent the inadvertent disclosure or unauthorized access to confidential information.

Does John possess confidential information about his client Maria?

Although the facts here make no reference to any particular piece of client information, there is one that is the most obvious: Maria is John's client. He also knows, of course, the nature of the work he is doing for her, but there is nothing in the above scenario that suggests he intends to disclose the existence of the lawyer-client relationship, or discuss information, even hypothetically, about her case.[155] Accordingly, the confidential information at issue here that might be discovered by the "friending" relationship is the fact of the representation.

Does the mere "friending" of Maria without more amount to a disclosure of the lawyer-client relationship?

Probably not. There would be no disclosure of the lawyer-client relationship if the only information made available on John's Facebook page is that someone named Maria Valdez is a friend and there is no other public information about Maria which would identify her as someone using the services of an immigration lawyer. However, if Maria gave an interview to an immigrant rights group, which was aired on TV, being one of John's Facebook friends might lead to the discovery of the lawyer-client

[155] If John did intend to discuss Maria's actual case (not as a hypothetical) on his Facebook page, there is no question that he would need her informed consent. He also likely would need to obtain her informed consent to discuss her case as a hypothetical as well unless there was absolutely no risk that the facts disclosed in the hypothetical would lead to discovery of confidential information.

relationship. Discovery of the lawyer-client relationship could also occur if one of John's other Facebook friends saw that Maria was listed as John's Facebook friend and mentioned Maria's name to someone else who by chance knew that Maria was undocumented and had retained an immigration lawyer named "John."

John could keep the fact that Maria is a friend from others by exercising the privacy controls available on Facebook (and other similar social media applications) by limiting access to his Facebook information. For example, when setting up a Facebook account the holder has the ability to limit access to information—including who his friends are—on his Facebook account. John may thus prevent his friends from seeing who is other friends are. The same applies to Maria's Facebook account. Maria may or may not permit a friend to see who her other friends are. The more of John's "friends" who are able to see that Maria is a friend, the greater the chance that someone might have other information which will lead them to conclude that Maria is John's client.[156]

Some might argue that the disclosure of Maria as John's Facebook friend is no different than if Maria attended a party given by John or if Maria met someone she knew in John's office waiting room. In the latter since it is Maria's decision to wait in the waiting room, it would be hard to argue that John could be held responsible for disclosure of a lawyer-client relationship if it turned out someone who knew her was waiting as well. It behooves a lawyer to ascertain the client's wishes as to confidentiality of the lawyer-client relationship and to advise the client of the risks of disclosure depending on the circumstances. In some cases, a client may not wish to be identified as a client at a party or by being seen at a lawyer's office by any outside party. These same considerations must be applied when involving a client in social media.

Of course, Maria may not care if anyone knows that John is her immigration lawyer. Nevertheless, before inviting Maria to be a friend or accepting her offer to become a friend, John should either obtain Maria's informed consent to the actual disclosure of the lawyer-client relationship through his Facebook account or to the risks that the lawyer-client relationship could be inferred by others from the totality of the information available on John's Facebook account or from other sources. If Maria expresses concerns about taking that risk and does not give her whole-hearted consent, John should not have Maria as a friend. The fact that Maria invites John to be a Facebook friend does not, without more, amount to evidence that Maria impliedly authorizes the disclosure of the lawyer-client relationship, since we do not know how much Maria knows about using Facebook. John would have to obtain Maria's informed consent to the actual or possible disclosure of the client relationship before agreeing to be a friend.

In the above-scenario, John's obligation of confidentiality, even as to the mere existence of a lawyer-client relationship, would be the same if he or Maria waited until the representation had concluded, since he owes the same duty of confidentiality to a former client. In the event that John's representation of Maria was successful, she might have no reason to keep the representation confidential. She might even want to praise John on his Facebook page for the good work he d*id.* At that point there would be no risk of improper disclosure of the representation, but John still would need Maria's informed consent to discuss other confidential information about the case.

[156] We do not provide a full explanation of how Facebook works. Lawyers who decide to have a Facebook account or agree to participate as a "friend" on someone else's account should familiarize themselves as to how it works before agreeing to be a "friend" for the reasons discussed in the above scenario. The more "friends" that have access to information about the identity of other "friends", the greater the potential for discovery of otherwise confidential information. There is also the possibility that subterfuge may be used to gain access to information on a Facebook page. In addition, for many different reasons, a lawyer may wish to limit access to personal or even professional information to those on a need-to-know basis only.

What is best practice?

As we have stated, the mere "friending" of a client without more would likely not amount to a *per se* violation of Rule 1.6. But why would a lawyer even want to take a chance that it was? The safest course to follow in this type of scenario is for the lawyer to take appropriate steps to obtain the client's informed consent to becoming a Facebook friend of the lawyer or vice versa. At a minimum, any lawyer who chooses to add clients as friends should have a thorough understanding of how to limit access to information. When a client chooses to seek the lawyer as a friend, it could be argued that the client has impliedly authorized disclosure of the lawyer-client relationship. The same considerations apply to social media applications such as Linked-In, a professional networking application. Since one of the main purposes of Linked-In is for professional networking, it would seem a given that those participating are impliedly authorizing their relationship with the Linked-In holder be disclosed to others. Often a person will connect with a lawyer as a prospective client, but the lawyer would have no way of knowing that without more. He may accept the request as a potential business lead. Nevertheless, while the jury is still out on whether friending or connecting on professional networks, will violate Rule 1.6 without explicit informed consent, a lawyer should tread carefully to avoid the possibility of violating Rule 1.6.

Hypothetical Five: GREEN CARDS R US- Mum's the word!

Your immigration law firm, Green Cards R Us, hires two paralegals. Allison has had five years of experience working for a mid-size immigration firm after obtaining a certificate of paralegal studies. Her substantive experience has mainly been in handling asylum cases. Mark recently graduated from a well-respected university. He has never worked as a paralegal or in a law office. His prior work experience is solely as a lifeguard in past summers.

During Allison's and Mark's first week in your office, your firm is engaged by its largest corporate client, Ford, to provide immediate assistance on the transfer of nonimmigrant petitions because of a corporate merger happening over the weekend between your client Ford and its competitor Chevy. Both Ford and Chevy are publicly traded corporations, and the merger has not yet been publicly announced. You need all of the resources available to the firm in order to complete the work on time. You accelerate Allison's and Mark's training so that it will be completed before they start work on the matter. The training includes a full explanation of the legal issues and practical tasks involved in transferring non-immigrant petitions, without disclosing the clients. The training also includes a 30-minute private lecture from the firm's general counsel on the importance of maintaining confidentiality under Rule 1.6, including taking care not to discuss work matters in public places.

While Allison is an experienced paralegal, she is particularly excited to be involved in a new area and a high-profile matter. Mark is nervous because of his lack of experience in business matters, let alone immigration law. Just prior to starting work on the matter, they learn it concerns the impending merger between Ford and Chevy, which has not been publicly announced.

Later in the day, Allison and Mark go to the local coffee shop, frequented by other office workers including those from the stock brokerage across the street. During lunch, they discuss how tired they already are because of the pressure of working on such a potentially high-profile matter involving the merger of two important U.S. companies. Mark says he's always loved

Chevy and hopes that its products will still be manufactured after the merger. As it turns out, two stockbrokers sitting at the next table and overhear the entire conversation.

When he has finished work, Mark takes a taxi home at midnight. He tells the taxi driver that he been working hard on a highly confidential matter, which he is not allowed to disclose. Prompted by the taxi driver's questions, he tells him reluctantly that it involves a merger between two big companies.

Analysis

Do the law firm's paralegals, Allison and Mark, have a lawyer-client relationship with Ford, which triggers the duty of confidentiality?

Not technically, but as non-lawyer employees of the firm they are obligated to hold client matters confidential in the same way as the law firm or lawyers within the firm are obligated. MR 5.3 makes clear that as non-lawyer employees of the law firm, they are required to abide by the same ethical obligations imposed on lawyers and law firms. Should they violate the duty of confidentiality under Rule 1.6 or any other rule of professional responsibility, the law firm or the lawyer with managerial or supervisory authority over Allison and Mark could be help responsible for that violation in the same way as if the lawyer or law firm had committed the violation herself. Although we have already discussed MR 5.3 at pp. 47-50, we cite the rule below, because of its importance to immigration lawyers who normally rely heavily on non-lawyer support in the everyday practice of immigration law.[157] Under MR 5.3, a lawyer is required to make reasonable efforts to ensure that his firm's non-lawyer employee's "conduct is compatible with the professional obligations of the lawyer" and he will be held responsible for any breach of those obligations if the lawyer has failed to take appropriate measures to ensure that the non-lawyer complies with those obligations.

Do Allison and Mark possess confidential information about the law firm's client Ford's merger?

Yes. They possess knowledge in the first instance that Ford is a client of the firm and knowledge that Ford and Chevy are merging. They also know that the merger has not been publicly announced and that the matter is confidential.

[157] Rule 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyers employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Does the conversation between Allison and Mark in a public place within earshot of others reveal confidential information otherwise protected by Rule 1.6? Does Mark's conversation with the Taxi driver reveal confidential information otherwise protected by Rule 1.6?

The Coffee Shop Conversation

While it does not appear that Allison and Mark are acting with the intent to disclose confidential information, their discussion of the work they are doing in a public place increases the likelihood that others may learn confidential information. In this scenario the information is overheard and by people who are in a position to use the information for personal benefit. Further, while the information disclosed does not reveal the totality of the confidential information, it reveals enough to lead to the discovery of confidential information and thus it is protected under Rule 1.6. We parse the statements in the conversation in order to determine whether it reveals confidential information:

Remark 1: Disclosure that Allison and Mark are working on a merger of two important companies *without more* probably would fall into the category of the permitted use of a hypothetical. Many companies merge and without further information from any other source, this disclosure would not be enough to reveal the actual clients.

Remark 2: The additional disclosure that the merger involves two of the most important companies within a particular industry with only a handful of companies increases the likelihood of discovery of confidential information. Therefore, it would probably be deemed to reveal confidential information.

Remark 3: Mark's remark about hoping that "Chevy" products would still be manufactured would make it easy to conclude that the merger involves information that would be clearly confidential. Someone hearing that information could correctly conclude that one of only several companies was merging with Chevy. Accordingly, the latter two remarks of the conversation would be deemed to reveal confidential information.

The Taxi Ride Conversation

Mark's disclosure to the Taxi driver that he is working on a confidential matter involving two major companies, as in the case of the Coffee Shop conversation, does not reveal confidential information since it is general information that would not lead to discovery of confidential information. However, Mark's description of the matter as "confidential" clarifies that he knows that he is not allowed to disclose such information. As such, it suggests that Mark apparently did not realize his conversation with Allison in the coffee shop amounted to an inadvertent disclosure of confidential information, presumably because he did not consider that the conversation could be overheard.

Would the law firm be ethically responsible for Allison and Mark's breaches of confidentiality?

Most likely no, as long as the lawyer or law firm could demonstrate that the firm had in place training and other procedures sufficient to reasonably assure them that their non-lawyer paralegals would not improperly disclose confidential information. Further, the lawyer who had managerial or supervisory authority over Allison and Mark would need to demonstrate that he had no actual knowledge of the conduct, did not order or ratify the conduct and did not otherwise have an opportunity to mitigate the improper disclosure. In other words, the law firm would take the position that it did what was reasonably necessary under MR 5.3 to educate and insure that their non-lawyer employees complied with the duty of confidentiality.

The kind of reasonable efforts contemplated by MR 5.3 would include proper training of paralegals as to the need for confidentiality, in addition to the appropriate degree of due diligence in checking their

references prior to the hiring and discussing the importance of confidentiality with potential non-lawyer employees at the earliest stages of the hiring process. Proper training might also include reminders during regular staff meetings of the need for confidentiality. Under the facts here both Allison and Mark timely received legal and practical training for the merger. They also attended a special 30-minute lecture from the firm's general counsel devoted solely to the issue of confidentiality. Under the facts here, the lecture included the dangers of talking about cases in elevators and other public places even in hypothetical form—a common cause of ethical breaches. If the lecture did not cover that subject or if it was addressed in a way that would not impress upon the attendees the dire consequences of improper disclosure to the firm, the client and ultimately the non-lawyer paralegals, it could be a closer question as to whether the firm would be held responsible.

Because there is no indication in the scenario that any lawyer in the firm knew about the likelihood of the disclosure or learned of it in time to mitigate the harmful effect of the disclosure, there would be no additional basis for any lawyer to be held responsible for the disclosures. For the Coffee Shop conversation, if one of the firm lawyers overheard the start of the conversation between Allison and Mark, he might have had a chance to advise them to stop talking about work matters, period. Or perhaps if one of the lawyers heard Allison and Mark talking about the merger in the hallway as they started to get into the elevator, he might be deemed to have reason to know that Allison and Mark did not fully comprehend the proscriptions against discussing firm matters in public places and should have taken action at that time.

In the above scenario, it appears that Allison and Mark did not heed the warnings they were given about confidentiality and the firm ought not to be held ethically responsible. Factors that might lead to the firm's ethical responsibility would be evidence that the firm has employed other paralegals who made unauthorized disclosures, or that the firm itself had been careless in the disposal of confidential documents or that the firm had inadvertently sent confidential information via email in a situation where two clients had the same name. These kinds of repeated "mistakes" might lead to the conclusion that the firm had a cavalier attitude toward the issue of confidentiality, despite what seemed to be appropriate conduct "on paper.[158]

Hypothetical Six: Asylum Corroboration: Can We Trust the Mail?

Your client is applying for asylum, withholding of removal, and relief under Article III of the Convention Against Torture after being detained and tortured by security forces from Democratic Republic of the Congo, allegedly because of his involvement in student politics. While he may be able to obtain relief based on his testimony alone, you discuss the changes from the REAL ID Act that place a greater burden on the applicant to corroborate asylum, withholding, and CAT claims.[159] You discuss specific types of corroborating evidence that may or may not be available in his case, such as an affidavit or letter from his family or hospital records for treatment of injuries following his release from custody. In response, your client suggests that it would be best for you to send a letter by DHL addressed to his father in the Congo asking for the father's affidavit confirming that his son was imprisoned and beaten so badly that he had to be hospitalized. You have concerns as to whether the repressive government of the Congo has a practice of routinely opening and examining foreign packages and mail.

[158] From a business perspective the disclosure of confidential information by the firm's employees could result in a public relations nightmare as well as subjecting the firm to a civil suit for damages.

[159] 8 USC §1158(b)(1)(B)(ii)-(iii)(2006)(amending 8 USC §1158(b)(1)(B)(ii)-(iii)(2002).

The above scenario concerns the elements of "informed consent" and "implied authorization" to disclose confidential information to third parties for the purpose of obtaining evidence in support of an application for relief. It also raises the subject of the lawyer's ethical responsibility to provide the client with sufficient facts and judgments for any consent to be informed. Lastly, it concerns the steps, if any, the lawyer must take to avoid inadvertent disclosure, even when there is no question as to consent.

Analysis

Does the request for a sworn affidavit from your client's father supporting the asylum application constitute confidential information within the reach of Rule 1.6?

Yes. The term confidential information is construed very broadly to include not only the fact of the representation, but also any other information relating to the representation. Improper disclosure of confidential information concerning asylum cases has especially severe consequences.

Does the lawyer need the client's consent or implied authorization to disclose confidential information to the client's father?

Yes. Unless the fact pattern comes within one of the listed exceptions, which is does not, a lawyer needs either the client's informed consent or there must be implied authorization to reveal a confidence.

Does the client's suggestion that the lawyer write to his father in the Congo to obtain an affidavit in support of his asylum claim amount to implied authorization under Rule 1.6?

Maybe, but likely no. Generally, a client's suggestion that his lawyer contact specific relatives to obtain evidence in support of his claim for relief would amount to implied authorization as long as contacting those specific relatives in the United States by mail or otherwise would not present any extraordinary concerns about unauthorized disclosure.[160] However, we know here that the lawyer has some concerns about unauthorized access to confidential information by the Congolese government authorities which, under the scenario above, have not been explicitly discussed. While it could be presumed that the client knows about the risk that the mail would be intercepted given his involvement in student politics and first-hand experience in being detained and tortured, because the stakes here are so high, the conclusion that there is implied authorization cannot be justified without concrete evidence that the client is aware of the Congolese government's practices regarding foreign mail and that the government could use the confidential information disclosed in the lawyer's letter to harm the client or members of his family. The lawyer would be on very shaky ground to assume there was implied authorization.

Does the client's suggestion that the lawyer write to his father to obtain an affidavit in support of his asylum claim here amount to "informed consent" under Rule 1.6?

No. For essentially the same reasons discussed above, without a full discussion between the lawyer and the client about the risks involved in writing to his father in the Congo, via DHL or any other reasonable alternative, the client's suggestion to contact his father in the Congo by DHL would not amount to informed consent. The discussion of risks would also have to include the consequences of not obtaining an affidavit from the father. If the client does not have knowledge of the pros and cons concerning the mailing, his suggestion alone would clearly be insufficient to establish informed consent.

[160] For example, where the lawyer has obtained the client's informed consent to contact the client's "friends and relatives" in the U.S. to obtain evidence in support of relief, the lawyer need not obtain consent to contact a specific friend or relative, as such authorization was implied.

What is the extent of information that the lawyer is ethically required to provide under Rule 1.6 in order for the client's consent to be deemed informed, here?

The client needs enough information to be able to decide if there is a risk of government interception of mail in the first instance and whether the benefits of obtaining the father's affidavit outweigh the risks associated with unauthorized disclosure. Obviously, the lawyer would have to offer some factual basis to raise the issue of government interception of mail, since the client may or may not have personal knowledge of such practices by the government. The lawyer may need to do further research in order to determine the likelihood that the mail would be intercepted. This might be obtained by consulting with the carrier, reviewing country conditions reports, and discussing the issue with country experts, other immigration lawyers or individuals with personal experience in the country who are living in the United States. The lawyer would have to discuss the risks of unauthorized disclosure, e.g., harm to his father, weighed against the benefits to his application. Conversely, consideration would have to be given to the consequences of not trying to obtain evidence from the father in light of heightened level of proof required under the REAL ID Act. Further consideration would have to be given to other ways to corroborate the client's application, such as through statements from other people outside the country who may have direct knowledge of the claim.

Even with the understanding that the decision is ultimately his, the client would likely be interested in the lawyer's educated opinion. For all these reasons, it would behoove the lawyer to gain as much information as possible about the practical realities of trying to get the affidavit under risky circumstances and the downside of not getting the affidavit at all.[161] If the lawyer really believes that taking the risk is the wrong choice, the client may want to defer to the lawyer's judgment after being presented with all relevant facts.

Assuming the client's consent is deemed to be informed, does the lawyer have any additional responsibility here under Rule 1.6?

Yes. Even with the client's informed consent, the lawyer has an affirmative duty to take reasonable efforts to prevent inadvertent disclosure of confidential information. See 1.6(c). The lawyer may need to contact the appropriate DHL representative to determine what measures, if any, the company takes to prevent interception and the company's estimate as to the likelihood of interception. The lawyer should investigate the reliability of other mail carriers in this regard as well. The lawyer may want to investigate the possibility of in-person delivery of the letter and pick-up of the affidavit. For example, does the client have a family member or friend who is traveling to the Congo? Are there trusted non-governmental organizations that could be of service in insuring some kind of personal delivery? Is electronic communication an option and would it provide more safety? In other words, the lawyer must reasonably explore the alternatives to mailing the letter request via DHL and employ any extra protections afforded by the mail carrier in the first instance.

E. State Rule Variations

Although there is a fundamental similarity between most state duty of confidentiality rules and MR 1.6, only a tiny minority of states have adopted the most recent version of MR 1.6 discussed in this module. The similarities include the basic prohibition against revealing confidential information without client consent or implied authorization, exceptions which may include permission to reveal confidential

[161] As is often the case, this hypothetical implicates other rules of professional conduct which are not the focus of this Module. In particular, in order to satisfy the requirement that the client's consent be informed, the lawyer must be competent. *See* MR 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.")

information to prevent death or bodily harm, or a crime involving injury to a financial or property interests. However, because some state rules differ more dramatically and also because of even subtle differences between MR 1.6 and a state's rule, we urge immigration practitioners not only to check their state's comparable Rule 1.6, but also to review the Comments carefully. Conduct that is expressly covered in the text of MR 1.6, but omitted from the text of a state's rule, may be discussed in the Comments. When in doubt the prudent and conscientious immigration lawyer would be wise to abide by the analysis and advice in the state rule Comments and seek guidance from the state bar associations directly as to any significant variations.

Major Variations

Delaware, District of Columbia, New York, Michigan

Significantly, two specific sub-sections of MR 1.6, which were recently added, do not yet appear in the vast majority of state rules on confidentiality. The first is the exception under MR 1.6(b)(7) which permits disclosure of confidential information to facilitate identification of conflicts when a lawyer moves to another firm or there is a change in composition or ownership of the firm. To date, only Delaware has adopted MR 1.6(b)(7).[162]

The other sub-section not included in the majority of state confidentiality rules is MR 1.6(c) which requires that lawyers make "reasonable efforts" to safeguard confidential information from inadvertent disclosure or unauthorized access to the information, generally.[163] Only one state, Delaware, has adopted MR 1.6(c) verbatim. The District of Columbia, New York and Michigan have adopted a more narrowly constructed "reasonable care" rule which requires lawyers to take steps to prevent "employees, associates, and others" providing services to the lawyer from "disclosing or using confidences or secrets of a client…"[164] The rules applied in these three jurisdictions make no mention of inadvertent disclosure or unauthorized access to confidential information, as does Rule 1.6(c), which may arise in cases where confidential information is transmitted or stored electronically. The "reasonable care" rule used in some state versions of MR 1.6, applying to those who provide services to the lawyer, is basically an extension of the rule holding a lawyer responsible for the conduct of those under his supervision. *See* MR 5.1 and MR 5.3.

Arizona, Florida, Illinois, Iowa, New Jersey, Nevada (when the act is criminal), North Dakota, Tennessee, Texas, Vermont) Washington, and Wisconsin

Another major area in which many states vary from MR 1.6 is that some states expressly *require* disclosure of confidential information to prevent death or substantial bodily harm generally or as a result of the client's conduct, in particular. By comparison, MR 1.6's exceptions only *permit* disclosure depending on the circumstances, even when the lawyer is reasonably certain that death or substantial

[162] As discussed, a state's comments may nevertheless address the permissibility of disclosing client confidences in order to determine any conflicts. For example, Comment 5A to Colorado's Rule 1.6 states: "A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified."

[163] As discussed, a state's comments may address the level of care required to safeguard confidential information from unintended disclosure. For example, Comment 20 to Arizona's Rule 1.6 sates: "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision."

[164] *See, e.g.*, Mich. Rule 1.6(d):

> A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) [exceptions] through an employee.

injury may occur. The states which require disclosure to prevent death or substantial bodily harm are: Arizona, Florida, Illinois, Iowa, New Jersey, Nevada (when the act is criminal), North Dakota, Tennessee, Texas, Vermont (disclosure is required in cases when the harm is to another, otherwise disclosure is permissive), Washington, and Wisconsin.[165]

We do not include here a thorough analysis of all the variations (some subtle—some not) between each state's rule of confidentiality and MR 1.6. Instead, we highlight certain variations to assist the immigration practitioner's own determination of the impact of the differences in ethical obligations under his home state's rule. The areas of focus include the following variations from MR 1.6.

State Variations as to Death or Bodily Injury

Georgia, Arkansas, Kansas, Michigan, Virginia, West Virginia, and Wyoming

As discussed above, some state rules of confidentiality require disclosure of information in order to prevent death or substantial bodily harm, whereas MR 1.6 only permits disclosure. A small number of states do not address this circumstance. These states include: Georgia, Arkansas, Kansas, Michigan, Virginia, West Virginia, and Wyoming.

There are also many subtle variations in state rules concerning disclosure to prevent death or substantial bodily harm, among them is the limitation that the death or harm be caused by the client. Those states are New Jersey (requiring disclosure only when client intends to harm to another, but permitting disclosure when the harm is to the client) and Vermont (same). *As discussed throughout this Module with respect to all the rules discussed herein, lawyers should check their home state's rule with respect to other subtle variations as to this exception.*

State Variations as to Conflict Checks

As discussed above, only one state expressly permits disclosure in order to discover potential conflicts when a lawyer moves to another firm or there is a change in the firm's make-up.

State Variations as to Reasonable Efforts

As discussed above, only a handful of states expressly require a lawyer to take reasonable "efforts" or "care" to safeguard unintended disclosure of confidential information.

State Variations as to Duty of Confidentiality in Specific Circumstances

Some states address confidentiality under circumstances involving lawyer assistance programs (the District of Columbia, Illinois, Massachusetts, Mississippi, Nebraska, North Carolina, Utah, and Virginia), the sale of a law practice (Oregon and Pennsylvania), lawyer counseling (the District of Columbia), government employment (the District of Columbia and Hawaii), court intermediary program (Illinois), lawyer's physical or mental disability or the appointment of a guardian or conservator of an attorney's client files (Indiana), lawyer's probation (the District of Columbia and Massachusetts), withdrawal of written or oral opinion (New York), providing information to an outside agency for office management purposes (Virginia), perpetration of fraud upon a tribunal (New Jersey and Virginia), when client is serving as court-appointed fiduciary (Washington), lawyer appointed as guardian ad litem

[165] Some states *require* disclosure of confidential information when the client's acts result in injury to the financial interests or property of another. These states include: Hawaii (to rectify consequences of such act), New Jersey (to prevent client or another person from committing a criminal, illegal, or fraudulent act), Vermont (similar to New Jersey but requires that the client has used or is using the lawyer's services to further the act) and Wisconsin (similar to New Jersey but does not include illegal acts). By comparison, MR 1.6's exceptions only *permit* disclosure under those circumstances. The "act" in Hawaii, Vermont, and Wisconsin does not have to be a crime; it can be a "fraudulent act." The "act" in New Jersey includes a "criminal, illegal or fraudulent act."

(Wyoming), and the prevention of bribery or intimidation in proceedings before a tribunal (Washington, D.C.).

State Variations as to Self-Defense Exception

Only one state, California, does not have any self-defense exception permitting disclosure, while the District of Columbia and New Jersey limit the circumstances in which the self-defense exception applies. Michigan extends the self-defense exception to "the lawyer's employees or associates against accusations of wrongful conduct." MI R. 1.6(b)(5). New York is similar to Michigan. Texas is unique in that the type of information (confidential v. unprivileged client information) allowed to be disclosed depends on what type of proceeding the lawyer is defending against.

State Variations as to Confidences or Secrets

Some state rules use the terms "confidences" and "secrets" in describing the information to be protected, while others provide a definition of confidential information in the text of the rule. Those states are: Alaska, the District of Columbia, Georgia (providing definition), Maine, Michigan, New York (providing definition), Oregon, Texas (providing definition), and Virginia (providing definition).

State Variations as to Scienter

Some states impose a scienter requirement in prohibiting disclosure of confidential information by inserting the word "knowingly," *i.e.*, New York's Rule 1.6(a) provides that a "lawyer shall not *knowingly* reveal confidential information . . . unless . . . ." (emphasis added). Other jurisdictions that include a scienter requirement are: Michigan, Minnesota, Texas and Wash. D.C.

State Variations as to Compliance

Many states add to the exception concerning compliance with "law" or "court order" to also include compliance with the "Rules." Those states are: Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

State Variations as to Reference to Other Related Rules

Some state rules specifically refer to other related rules. Those states are: Alaska (Rules 1.1, 3.3, 5.1 and 5.3), Arizona (Rule 3.3), Arkansas (Rules 1.8(b) and 1.16(d)), California (Business and Professions Code section 6068), Massachusetts (Rules 3.3, 4.1, and 8.3), Minnesota (Rule 8.3), New York (Rule 1.0(j)), Ohio (Rules 3.3 and 4.1), Oregon (Rule 1.17), Pennsylvania (Rules 1.17 and 3.3), Tennessee (Rules 3.3 and 4.1), Texas (Rules 3.03(a)(2), 3.03(b), and 4.01(b), Rule 5.03 of the Texas Rules of Evidence, Rule 5.03 of the Texas Rules of Criminal Evidence, Rule 5.01 of the Federal Rules of Evidence for United States Courts and Magistrates), and Virginia (Rule 8.3).

State Variations as to Consent

Some state rules vary as to the terms "informed consent" or "consultation", but these differences do not amount to a substantive difference. The following states require that the client "consents after consultation": Alabama, Hawaii, Kansas, Massachusetts, New Jersey, Texas (has a different subsection for express authorization), Virginia, and West Virginia.

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Meghan Moore

David Bloomfield

Reid Trautz

Maheen Taqui

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American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.7
Conflict of Interest: Current Clients

Sherry K. Cohen, Reporter

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MODEL RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

Introduction

The "devil is in the details" is an often-used phrase that applies with great force when lawyers are confronted with conflict of interest issues in the representation of clients. A common ethics question posed by immigration lawyers is whether they can ethically represent petitioners and beneficiaries at the same time. There are a number of model rules that address that scenario and others involving conflict issues, but applying those rules to the particular circumstances of a representation is not easy. Some of the consequences of violating conflict rules include disqualification, a bar to collection of legal fees, malpractice actions, as well as professional discipline. At a minimum, conflict issues may sour the lawyer-client relationship.

Briefly, MR 1.7, the focus of this chapter, concerns what may be deemed the most obvious conflict—that being a conflict between a lawyer's current clients.[1] Its basic precept—that a lawyer must avoid representation in which his ability to provide competent and diligent representation to one or more clients is materially compromised—is the foundation of all conflict rules. As noted recently in a federal case in which lawyers representing multiple parties were disqualified:

> But a lawyer is different. Representing a client creates an unshakable loyalty that can still persist when bonds of friendship and family fail. There's a practical reason for this. A lawyer needs to know the worst facts to give clients the best advice. Clients can't feel comfortable providing such candor unless they know their lawyer is absolutely committed to advancing the clients' interests and advocating against the conflicting interests of others. Though the rest of the world may be united against them, clients need to know that at least their lawyer will reliably remain in their corner, even in the face of great temptation.[2]

Other rules in the AILA Ethics Compendium address conflicts of interest in different settings. MR 1.8, entitled "Current Clients: Specific Rules," presents factually specific rules concerning conflicts involving many types of relationships between a lawyer and a current client that might unfairly benefit the lawyer, such as business transactions between lawyer and client and third-party payer situations. MR 1.9 concerns conflicts that

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[1] MR 1.7 provides as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

The text of this rule and all other ABA Rules of Professional Responsibility cited in this chapter may be found at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html.

[2] Case No. SACV 13 -1956 AG (JACx), SACV 15-1279 AG (JCGx), U.S.C.D. Cal., (June 24, 2016) (in lengthy decision which included an extensive discussion of duty of loyalty and conflicts law, court disqualified law firm from representing sophisticated plaintiff in complex civil racketeering case, where the firm also represented defendant in criminal case, despite numerous waivers of conflicts of interest that were deemed ineffective); see also ABA Formal Ethics Op. 1495 (1982) ("loyalty is an indispensable element of the lawyer's relationship with the client").

may arise between a lawyer and a former client. MR 1.10 concerns imputation of conflicts. MR 1.18 addresses a lawyer's duty to prospective clients, which includes avoiding conflicts of interest.

Other related model rules include MR 1.1 (lawyer's duty to render competent representation), MR 1.3 (lawyer's duty to render diligent representation), MR 1.6 (lawyer's duty to protect confidentiality of client information), MR 1.16 (permissive and mandatory withdrawal, and duty to avoid prejudice) and MR 3.7 (dealing with advocate-witness conflicts.[3] As will be noted throughout this chapter, immigration lawyers should always check the applicable state version of any Model Rule, including MR 8.5 concerning jurisdiction and choice of law.[4]

In addition to the Model Rules discussed above, immigration lawyers must also consider applicable grounds for discipline under 8 CFR 1003.102, enforced by the Executive Office of Immigration Review (EOIR). Although conflicts of interest are not expressly addressed in the EOIR rules, there are a number of grounds for discipline that are implicated by a lawyer's conflict of interest, namely, ineffective assistance of counsel,[5] lack of competent representation,[6] failure to abide by client decisions,[7] lack of diligent representation,[8] and inadequate communication with client.[9] EOIR may suspend or disbar an immigration lawyer on the basis of its own rules or discipline imposed by another disciplinary authority for violations of state or other federal rules governing conflicts of interest.

MR 1.7 is composed of two sections, one of which defines and sets forth the basic prohibitions against conflicts and another which addresses the criteria for when a conflict is subject to "informed consent" of the affected clients (often referred to as a "conflict waiver" although "informed consent" is a more developed concept.)[10] MR 1.7(a) defines concurrent conflicts as falling into two categories. The first category, under MR 1.7(a)(1), involves the lawyer's representation of one client in a matter in which another client is "directly adverse." MR 1.7(a)(1) also applies to transactional matters, such as representing both buyer and seller in a real estate transaction.

The second category under MR 1.7(a)(2) is broader than MR 1.7(a)(1) in that it prohibits client representation in situations that would present a "substantial risk" that the lawyer's representation of one client would be "materially limited" by the lawyer's duties to another client, former client, or third party, or by the lawyer's personal interests.

In immigration matters, a MR 1.7(a)(2) conflict of interest often may occur in an employment-based case where the lawyer represents both the petitioner employer and the beneficiary employee. It may also occur in

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[3] MR 3.7(b) provides that a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

[4] State Bar associations generally publish the State's professional responsibility rules online. The ABA publishes line by line comparisons of the Model Rules with the various State rules. Available at http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html. A benefit of consulting the ABA chart is to learn whether a particular state has adopted an ABA rule verbatim. Where there are differences, the chart shows the literal word by word differences without analysis or context. We include in this EC chapter, and all others, a substantive analysis of how the state variation differs in summary form with reference to Comments when necessary. See Summary of State Variation from MR 1.7 at pp 6-52.

[5] See 8 CFR §1003.102(k).

[6] See 8 CFR §1003.102(o).

[7] See 8 CFR §1003.102(p).

[8] See 8 CFR §1003.102(q).

[9] See 8 CFR §1003.102(r).

[10] As amended in 2002, MR 1.7(a) expressly identifies two types of concurrent conflicts. Prior to the amendment, as noted by the reporter for the ABA's Ethics 2000 Commission, the wording used was not always clear and lawyers frequently became confused. See ABA, A Legislative History: The Development of the ABA Model Rules of Professional, 1982-2005, at 165 (2006).

family-based permanent residency matters where the lawyer represents the petitioner citizen spouse and the beneficiary spouse, or an unaccompanied child or impaired foreign national whose fees are being paid by a third-party relative. Both of these situations may also involve "third party payer" conflicts under MR 1.8(f). In other areas of law, a conflict under MR 1.7(a)(2), may be triggered by representing co-plaintiffs in a personal injury matter or co-defendants in a criminal matter.

MR 1.7(a)(2) also applies to conflicts between a current client and a former client.[11] In the immigration context in which there has been dual representation, the conflict may arise after the matter has been completed, such as where a beneficiary employee who has attained legal status has a wage dispute with the petitioner employer. It may occur after the lawyer successfully represents a married couple in a permanent residency matter, but later is asked to represent one of the spouses in a divorce action against the other spouse.

There is an exception to conflict of interest prohibitions which may apply if criteria set forth in MR 1.7(b) can be met. In particular, a lawyer may represent client(s) notwithstanding the conflict (i) under MR 1.7(b)(1) if the lawyer has a "reasonable" belief that he would be able to fulfill his duty of loyalty to each affected client by providing competent (MR 1.1) and diligent (MR 1.3) representation and (ii) under MR 1.7(b)(4) if the lawyer is able to obtain the client's "informed consent" in writing. Two specific types of conflicts are per se prohibited: a conflict that is prohibited by law (MR 1.7(b)(2)) and a conflict that occurs when one client asserts an adverse claim against another client in litigation or other proceeding before a tribunal (MR 1.7(b)(3)).

Given the variables that must be considered in complying with MR 1.7, it is not surprising that the Comments to MR 1.7 are extensive. There are thirty-five comments for a rule that entails only two paragraphs. Although true in the case of all of the Model Rules, the Comments to MR 1.7 are particularly important and lawyers must check not only the applicable state versions of MR 1.7 but also the state's version of the Comments.[12]

This chapter will include a comprehensive discussion of MR 1.7. We begin by discussing some key terms or concepts used in MR 1.7, followed by commentary and annotations for each sub-section of the rule, including citations to and discussion of ethics opinions and disciplinary decisions.[13] We will provide examples of conflicts in the immigration context throughout the chapter and discuss in greater detail "waivers of conflicts" in general and waivers[14] of potential conflicts in "dual or joint representation in the immigration context" as special areas of concern. Lastly, we will provide sections on state variations from MR 1.7 and immigration practice hypotheticals. In discussing the immigration hypotheticals, we will use a four-step analysis, namely:

- Who is the client?
- Is there a potential or actual conflict?
- If so, is the conflict consentable (also referred to as "waivable")?
- If so, is the consent informed and confirmed in writing?

[11] Lawyers should check the state's applicable version of MR 1.9 which specifically addresses former client conflicts. MR 1.9 will be discussed in greater detail in the upcoming EC Chapter for MR 1.18 (prospective client conflicts).

[12] Comment to MR 1.7 is available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/comment_on_rule_1_7.html.

[13] Lawyers may observe in reading the text and extensive footnotes in this chapter that we have tried to include as much detail as is practical in explaining the facts and legal conclusions concerning the conflict of interest at issue. Every conflicts scenario is unique and fact sensitive. We especially urge our readers to pay careful attention to the facts and legal conclusions in the ethics opinions and court decisions cited in this chapter in order to gain a more practical understanding of how to avoid impermissible conflicts of interests.

[14] We will use the terms "waiver" and "consent" interchangeably.

A. Text of Rules

ABA Model Rule 1.7—Conflict of Interest: Current Clients

To review the full text of MR 1.7 and the comments, please visit the Model Rules of Professional Conduct: Table of Contents on the American Bar Association's website.

B. Key Terms and Phrases

"Reasonable Belief" or "Reasonably Believes"

"Reasonably believes" is a term used in MR 1.7(b). A conflict may be waivable if, among other criteria, the lawyer reasonably believes that he or she will be able to provide competent and diligent representation to the affected client.[15] The Model Rules incorporate the concept of reasonableness in relation to both a lawyer's conduct as well as his or her belief that the "matter in question and that the circumstances are such that the belief is reasonable." See MR 1.0(h) & (i). How to apply these definitions to the conflicts problems that arise in daily practice is not easy. The language of the rules makes clear that the waivability of a conflict incorporates both a subjective and objective component. MR 1.0(h), that incorporates an objective standard, informs us that the lawyer's determination as to whether he or she is able to provide competent and diligent representation is held up against a "reasonably prudent and competent lawyer." It is a purely objective standard. MR 1.0(i), however, incorporates a subjective component. It looks at the lawyer's state of mind, defining a reasonable belief as the lawyer's belief that the matter, and the circumstances surrounding the matter, are reasonable.

"Informed Consent"

"Informed consent" is a term used in MR 1.7(b). A conflict may be waivable if, among other criteria, each affected client gives informed consent to the conflict.[16] As defined in MR 1.0(e) informed consent denotes "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." As noted in Comment 18, a lawyer must disclose and explain to the client the nature of the conflict and all of the circumstances and foreseeable ways that the conflict could adversely affect the client's interests. For example, the lawyer would need to explain the risks that the lawyer's duty to provide competent and diligent representation to one client could be impaired by the lawyer's same duty to another client.[17] Where the conflict arises from representation of multiple clients, the lawyer would also need to advise each client about how the representation may affect confidentiality and the lawyer-client privilege.[18]

"Confirmed in Writing"

"Confirmed in writing," is a term used in MR 1.7(b). A conflict may be waivable if, among other criteria, each affected client's informed consent is "confirmed in writing."[19] As defined in MR 1.0(b), when the phrase is used in reference to the "informed consent" of a person, it denotes consent "that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." As noted in the definition, if a lawyer is unable to "obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." The term "writing" or "written" as defined in MR 1.0(n) is a "tangible or electronic record of a communication or representation" that includes "handwriting, typewriting, printing, photostatting, photography, audio or video recording, and electronic communications." The concept of "confirmed in writing" does not require the client to sign the document, but prudent lawyers will strongly consider obtaining client signatures when feasible.

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[15] See MR 1.7(b)(1).

[16] See MR 1.7(b)(4).

[17] See Comment 18 to MR 1.7.

[18] Id. See also Comment 30 and 31 to MR 1.7. As discussed herein, obtaining informed consent may be challenging when the client(s) have language or other communication difficulties.

[19] See MR 1.7(b)(4).

C. Annotations and Commentary

MR 1.7(a)

MR 1.7(a) provides that "[e]xcept as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."

MR 1.7(a) expressly prohibits a lawyer from representing a client if doing so involves a "concurrent" conflict with an existing client.[20] Such conflicts go to the heart of the lawyer's duty of loyalty, which by definition would be divided if the interests of current clients were adverse.[21] Although not defined in the Model Rules, the duty of loyalty has been described as "the most fundamental of all fiduciary duties the legal profession owes to its clients."[22] However, as reflected in MR 1.7(b), discussed below, under certain circumstances a lawyer may undertake representations that would be otherwise prohibited under MR 1.7(a). Determining whether a particular representation may be subject to an exception is not an easy process.

MR 1.7(a)(1)

MR 1.7(a)(1) provides that "A concurrent conflict of interest exists if:

the representation of one client will be directly adverse to another client."

Identifying the Lawyer-Client Relationship Generally

Retained Clients

The first step in determining whether a conflict exists under MR 1.7 is to identify the clients at issue. This may seem obvious, but the process may be more complicated in the case of a large law firm in particular or even in the case of a small general practice firm with a large client base. In order to identify a potential conflict, lawyers or law firms should have procedures to determine the persons and entities (and later, the issues) that will be involved in the representations. This is commonly referred to as a "conflicts check." Such checks are vital for large firms in particular because under MR 1.10, one lawyer's conflict of interest may be imputed to other

[20] Conflicts involving "former" clients have different standards which are provided in MR 1.9. Conflicts involving "prospective" clients are addressed in MR 1.18.

[21] Comment 1 to MR 1.7 reiterates that loyalty and independent judgment "are essential elements in the lawyer's relationship to a client." See, e.g., lawyer's obligations under MR 1.1 (competence), MR 1.3 (diligence) and MR 1.6 (confidentiality).

[22] See Lawrence Fox, The Gang of Thirty-Three: Taking the Wrecking Ball to Client Loyalty, Yale Law Journal On-line, March 27, 2012 Yale Law Journal http://www.yalelawjournal.org/the-yale-law-journal-pocket-part/professional-responsibility/the-gang-of- thirty%11three:taking-the-wrecking-ball-to-client-loyalty/.

lawyers or the firm itself.[23] Conflict-checking procedures must also be employed when a lawyer moves to another law firm.[24] A lawyer's ignorance of a conflict as to a particular client is not a defense to violating MR 1.7.[25]

Implied Lawyer-Client Relationships

In addition to formal conflict-checking procedures, there is a duty to identify any possible lawyer-client relationships, even those that may arise without evidence of formal retention. The Model Rules do not define the phrase "lawyer-client relationship," but under common law, a lawyer-client relationship which triggers the lawyer's ethical obligations to the client, including the duty to avoid conflicts, is formed when a person or entity (the "person") reasonably believes the lawyer is representing its interests and/or providing it with legal guidance.[26] The person does not have to pay the lawyer any fees; the lawyer does not have had to spend extensive time with the client; and the client does not have to sign a written agreement to employ the lawyer. Simply put, a lawyer-client relationship may be inferred from the circumstances.[27]

Current Client or Former Client: Formal Termination?

In the process of identifying a client for conflict of interest purposes, a lawyer may need to distinguish current clients from former clients. This may be very important because, as discussed more fully below, the prohibition against a conflict of interest between current clients under MR 1.7 is more restrictive than those between a former and current client under MR 1.9. For that reason, the prudent and conscientious lawyer should consider memorializing the termination of the lawyer-client relationship where it may not be otherwise clear.[28] Because a formal termination letter is not required under the Model Rules after the matter at issue has been completed, many lawyers do not use them. Lawyers may also be reluctant to send a termination letter for fear of losing future work.

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[23] See MR 1.10(a) which provides in pertinent part that "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9." See also Energy Intelligence Group, Inc. v. Cowen and Co., 2016 WL 3920355 (S.D.N.Y. July 15, 2016) (court disqualified small firm, even though firm created substantial ethical wall after conflicted lawyer joined the firm, where prior representation was substantially related to new representation and ethical wall was insufficient to rebut imputation to new firm that had small number of lawyers (14) located in the same office space); Victorinox v. The B & F System, 2016 WL 4069868 (S.D.N.Y. July 29, 2016)(court denied motion to disqualify large firm which as a result of two mergers had simultaneously represented plaintiffs (through lawyers located in New York office) in the case before the court and one of defendants in other matters (through a lawyer located in the firm's Texas office); upon learning of conflict, Texas lawyer terminated relationship without mentioning conflict; court found large firm engaged in impermissible conflict under Rule 1.7 in part because its conflict check procedures were lacking and that the "termination" was misleading; nevertheless, court determined that Texas lawyer's conflicts should not be imputed to the New York team of lawyers based in part because the Texas lawyer's representation was very limited).

[24] See ABA Formal Ethics Opinion 09-455 (October 8, 2009) (moving lawyer and the lawyer's new firm have separate obligation to conduct conflicts checks, while at the same time addressing tension between confidentiality and conflicts analysis, although limited disclosure of confidential information permitted under MR 1.6, client consent may be required).

[25] See Comment 3 to MR 1.7. Lawyers should also check applicable state rules concerning mandatory conflict-checking systems. See e.g., New York Rule 1.10(e) and (f) which expressly requires that firms have conflict-checking procedures. See also Vermont Advisory Opinion 1999-05 (lawyer who practices in one firm may associate with another firm simultaneously, but under Rule 1.10 concerning imputed conflicts of interest, the two firms will be considered as one entity; it is incumbent on two firms to develop procedure for screening conflicts).

[26] See Restatement of the Law Governing Lawyers (3rd), §14. Formation of a Client-Lawyer Relationship.

[27] For additional discussion of prospective and current client relationships as it relates to confidentiality, see the Ethics Compendium chapter for MR 1.6, at 5-1.

[28] See, e.g., Jones v. Rabanco Ltd. No. CO3-3195P (W.D. Wash. August 3, 2006) (law firm that represented employees in suit against company, disqualified on the basis of current client conflict where firm had represented a subsidiary of company three years prior to lawsuit, still had open files on matters involving the company, continued to store documents from the earlier case in anticipation of further developments, officers of company still believed firm was representing them and although firm had not had contact with company or its subsidiaries for over three years, firm never formally terminated the relationship).

That, of course, is a business, rather than an ethical, decision.[29] One possibility is to make the letter a "completion-of-work and confirmation that account has been paid" letter. If the client has an outstanding amount due, the letter could still refer to the completion of the work.

Corporation v. Affiliate/Subsidiary

A sometimes difficult scenario concerns conflicts between a corporate client and an affiliate. In the first instance, if the lawyer represents a parent corporation, the lawyer must determine whether a lawyer-client relationship exists between the lawyer and a subsidiary or affiliate of the parent, even if there is no formal engagement agreement. As noted in Comment 34, a lawyer for a corporation would not be barred from accepting representation adverse to an affiliate in an unrelated matter, unless (1) the circumstances are such that the affiliate should also be considered a client of the lawyer, (2) there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or (3) the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.[30]

The leading ABA Ethics Opinion addressing this issue concluded that a lawyer who represents a corporate client "is not by that fact alone necessarily barred from a representation that is adverse to a corporate affiliate of that client in an unrelated matter." The opinion contemplates however that the affiliate may be deemed a client for conflicts of interest purposes even without a formal engagement agreement.[31] Lawyers faced with potential conflict problems in the corporate-affiliate scenario should proceed gingerly.[32]

Identifying the Lawyer-Client Relationship in the Immigration Context

As discussed above and more specifically below, immigration lawyers must be particularly careful in identifying who they are actually representing given that lawyer-client relationships may arise from a course of conduct, as opposed to formal retention.

One need not be a legal scholar to understand that a lawyer cannot ethically represent clients in matters in which one client's interests are directly adverse to those of another; in particular, representation of both the

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[29] A well-crafted termination letter may still leave open the possibility of the lawyer's availability to provide future services in related or unrelated legal matters. See, e.g. Jay Foonberg's "Favorite 70 Rules of Good Client Relations (items 38 and 39). Available at http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/foonberg.html.

[30] See Comment 34 to MR 1.7.

[31] See ABA Formal Ethics Opinion 05-390. In referring to what constitutes a lawyer-client relationship in the corporate setting, the opinion noted as follows:

[T] he client-lawyer relationship is principally a matter of contract, and the contract may be either express or implied. Thus, the entities within a corporate family that are to be considered clients may have been expressly identified as clients, or they may have become entitled to be so treated by reason of the way the representation of one of the members of the corporate family has been handled. In addition, it may be one of the terms of the engagement that the corporate client expects some or all of its affiliates to be treated as clients for purposes of Rule 1.7—i.e., that the lawyer will not accept engagements that would be prohibited by that Rule if the affiliates were clients.

See also, GSI Commerce Solutions Inc. v. BabyCenter LLC, 2d Cir., No. 09-2790-cv (August 18, 2010) (for conflict of interest purposes, corporate client and its wholly owned subsidiary deemed a single client where subsidiary relied on parent for operational services such as accounting, employee benefits and human resources, among others, to which lawyer owed duty of loyalty where parent and subsidiary have an "operational commonality" and there is financial dependence one on the other; both used same in-house legal department and there is some overlap of management control, among other factors showing "exceedingly close" ties).

[32] A comprehensive discussion of corporate-affiliate conflicts is beyond the scope of this EC. See generally Frievogel on Conflicts, Corporate Families available at http://www.freivogelonconflicts.com/corporatefamilies.html.

plaintiff and defendant in the same litigation.[33] MR 1.7(a)(1) thus prohibits representation of opposing parties in a domestic relations matter such as a husband and wife in a divorce proceeding[34] or opposing parties to a business transaction, such as both buyer and seller of a home.[35] However, the prohibition against current conflicts is not limited to clients who sue each other or transactions in which clients are diametrically opposed.

The interests of concurrent clients may also be directly adverse in unrelated matters and MR 1.7(a) prohibits such representations as well.[36] As noted in Comment 6, a directly adverse conflict may arise when a lawyer is required to cross-examine a client called as a witness in a lawsuit involving another client. There, the lawyer's duty of loyalty to the client she is representing in the lawsuit would be in direct conflict to the lawyer's duty of loyalty to the client who is the witness.[37] Similarly, a directly adverse conflict would arise in a case where the same lawyer is representing two clients in unrelated criminal matters and one of the clients advises the lawyer that he wants to testify against the other client to obtain a benefit in his own case.[38] There the lawyer would clearly not be able to advise the potential client-witness about the pros and cons of such testimony or disclose to the other defendant-client the confidential information concerning the potential-witness client.

While some lawyers faced with current client conflicts may believe that resolution of the conflict can be achieved by simply withdrawing from one of the representations, as Comment 4 to MR 1.7 explains, because the discharged client would become a "former" client, the conflict then would be covered within the reach of MR 1.9, which prohibits conflicts between a current and former client.[39] Under MR 1.9, which is less restrictive than MR

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[33] See Comments 6 and 23 to MR 1.7.

[34] See, e.g., Ware v. Ware, W. Va., No. 34720 (November 23, 2009) (citing precedent that lawyer must not represent both parties to a divorce, court found that lawyer cannot also represent both parties to a prenuptial agreement). Utah Ethics Advisory Opinion 116 (1994) (in connection with representation in a divorce, opinion confirms that Rule 1.7(a) creates a per se bar to dual representation of a plaintiff and a defendant in litigation, even in the settlement phase of that litigation). NYSBA Ethics Op. 867 (May 31, 2011 (comprehensive discussion of current client conflict in real estate transaction; absent compliance with MR 1.7(b), lawyer may not simultaneously represent buyer and seller in real estate transaction). Cf. Levine v. Levine, 56 N.Y.2d 42 (1982) (where Court declined to void a separation agreement where former husband and wife mutually agreed to retain the same lawyer (recommended by the husband) to handle the separation agreement; agreement did not create impermissible conflict).

[35] See, e.g., Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. Wagner, 599 N.W.2d 721 (Iowa 1999) (lawyer may not represent both buyer and seller in residential real estate transaction); Comment 7 to MR 1.7) (relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict.)

[36] See, e.g., Rembrandt Techs., LP v. Comcast Corp., No.2:05CV443, WL 470631 (E.D. Tex. Feb. 8. 2007) (disqualifying law firm from simultaneously prosecuting patent infringement claim for one client and representing potential infringer on other matters); MO. Ethics Op. 20010010 (2001) (lawyer retained by mother of minor child to represent child in personal injury case may not represent mother's husband, who is not child's father, in divorce action unless both spouses agree after full disclosure); see also Comment 6 to MR 1.7.

[37] ABA Formal Ethics Op. 92-367(1992) (generally, lawyer may not undertake representation that will require cross-examination of another client as adverse witness); Virginia Legal Ethics Opinion 1623 (February 17, 1995) (based on analogous Code provision, lawyer may not ethically represent a client who will be called to testify against another client in an unrelated matter, since by definition the appropriate cross-examination of the first client would create a non-waivable conflict).

[38] See, e.g., Virginia Legal Ethics Opinion 1882 (July 23, 2015) (where one criminal defendant client offers to testify against another client in unrelated criminal matter, lawyer has nonwaivable conflict of interest and must withdraw from both representations, because his inability to advise the first client about matters which would be detrimental to the second client; lawyer may not thereafter represent one of the clients under the former client conflict rule 1.9).

[39] A lawyer may not attempt to solve a current client conflict by dropping one client like a "hot potato." See, e.g., Markham Concepts, Inc. v. Hasbro Inc. D.R.I., No.15-419 S (July 22, 2016) (adopting the "hot potato" doctrine, court found that law firm bringing in lateral hire cannot avoid conflict of interest by unilaterally terminating longtime client, especially after long term client declined to waive the conflict at issue); Bryan Corp. v. Abrano, Mass., No. SJC-12003 (June 14, 2016) ("firm

1.7, the lawyer's duty of loyalty and confidentiality to the former client will generally create a conflict of interest with the current client only if the matter at issue is substantially related to the prior representation. Where clients are only marketplace competitors, a lawyer may usually simultaneously represent the clients in different litigations because the interests of the clients—former or current—are only economically adverse.[40]

Implied Lawyer-Client Relationships in the Immigration Context

In the context of immigration law, a person who had agreed to provide an "affidavit of support" (I-864) may have required assistance in filling out the form, as well as understanding the legal obligations imposed on that person. In such situations, when the immigration lawyer interacted with that person in connection with the affidavit, the person's subjective belief that a lawyer-client relationship existed was reasonable and a lawyer-client relationship could have been implied. Likely for that reason, it is no longer possible to argue that there is no lawyer-client relationship when the lawyer prepares the I-864 form because of the preparer certification requirements added in 2015.[41] [42]

Absent an express agreement to the contrary, a beneficiary in a family or employment-based residency matter may also reasonably assume that the lawyer representing the petitioner is also representing the beneficiary. At the inception of the representation, the interests of the petitioner and the beneficiary are aligned and there is a high degree of cooperation necessary to obtain the information to proceed with the matter.

An implied lawyer-client relationship may also develop between affiliated corporations in employment-based immigration cases involving L-1 visa petitions or EB-1 multinational manager petitions for employment-based permanent residence. The foreign affiliate, which may deal directly with the immigration lawyer, may reasonably assume that the lawyer is representing its interests as well and consider seeking representation in a dispute with the U.S. corporation or during merger negotiations with the parent corporation.

An implied lawyer-client relationship may not be established by the mere presence of a person who accompanies a potential client to a consultation if the matter at issue only involves the potential client and the lawyer provides no advice, receives no confidential information from nor undertakes to represent the other person.[43]

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may not undertake representation of a new client where the firm can reasonably anticipate that a conflict will develop with an existing client, and then choose between the two clients when the conflict materializes"); W. Sugar Corp. v. Archer-Daniels-Midland Co., 99 F.Supp.3d 1074, 1084 (C.D. Cal. 2015) (the "hot potato" doctrine "bars an attorney and law firm from curing the [improper] dual representation of clients by expediently severing the relationship with the pre-existing client").

[40] See Comment 6 to MR 1.7; New York State Bar Association Ethics Op. 1103 (July 15, 2016) (citing Comment 6 to NY Rule 1.7, under NY Rule 1.9, lawyer not precluded from accepting representation of new client in a litigation matter where former client is only a marketplace rival, even though successful outcome of new client matter would economically help the new client).

[41] See revised Form I-864. Lawyers who provide representation for completion of Form I-864 may wish to consider using a "limited engagement agreement" under MR 1.2(c) to limit the scope of representation which makes clear that the lawyer-client relationship will be terminated once the matter reaches conclusion.

[42] An argument may be made that representing a joint sponsor on an I-864 poses a non-waivable conflict of interest. See Doug Penn & Lisa York, How to Ethically Handle an I-864 Joint Sponsor, posted on AILA InfoNet at Doc. No. 12080162 (Nov. 7, 2012); Greg McLawsen & Gustavo Cueva, The Rules Have Changed: Stop Drafting I-864s for Joint Sponsors, 20 Bender's Immigration Bulletin 1287 (Nov. 15, 2015); See Bruce Hake & Brian C. Schmitt, Ethical Problems With The New I-864 Form, 20 Bender's Immigration Bulletin 1281 (Nov. 15, 2015).

[43] See Rhode Island Ethics Advisory Panel Opinion No. 2010-01 (February 23, 2010) (an estranged wife who had withdrawn a marriage-based petition for her husband, handled by a different lawyer, but accompanied husband to new immigration lawyer to handle his pending deportation case now was not deemed a client; there was no conflict of interest under Rule 1.7(a) and new lawyer could ethically proceed with the representation).

Directly Adverse Interests in the Immigration Context

An immigration lawyer representing a citizen husband and foreign national wife in a marriage-based permanent residency matter may be approached by the wife to file a VAWA petition because of physical abuse by the husband. Pursuit of the wife's case would be directly adverse to the husband's interests in avoiding accusations of abuse.

An immigration lawyer representing a regional center in an EB-5 matter and a foreign investor seeking permanent residency may be approached by the foreign investor to bring a civil action against the regional center for compensation where the underlying business investment failed. In that scenario, the interests of the regional center client would be directly adverse to the interests of the foreign investor.[44]

An immigration lawyer representing a publicly-traded U.S. employer and foreign national in a permanent residency matter may be told by the employer on a confidential basis, after the I-140 petition is filed, that the company is being sold to a third-party that intends to conduct a massive layoff, but that the information will not be made public until after the upcoming annual meeting. In that scenario, the interests of the employer in keeping the information confidential would be directly adverse to the interests of the employee whose immigration status is dependent on a continuing employer-employee relationship with the company.

Disciplinary Case on Conflict of Interest Compounded in the Immigration Context

That an immigration lawyer must comply with Rule 1.7 was made clear in a Maryland disciplinary case in which the lawyer was harshly disciplined for numerous ethical violations, among them, engaging in a current client conflict of interest. There, the lawyer had represented the lawyer's niece, a foreign national, and the U.S. citizen husband in obtaining permanent residency for the niece. The lawyer later represented the husband in sponsoring other family members. Nevertheless, at her niece's request, the lawyer also agreed to represent the niece in seeking an annulment of the marriage. The lawyer was aware that such representation created an impermissible conflict of interest, in part because the husband was opposing the annulment, and his interests would be directly adverse to those of the niece. The lawyer was aware of the conflict stating in an email sent to a colleague that if the husband retained counsel in opposing the annulment "they would disqualify [the lawyer] for the conflict [of] interest."

Rather than decline the representation, the lawyer attempted to circumvent Rule 1.7 by not filing a notice of appearance and essentially acting as shadow counsel for her niece, who proceeded on an alleged "pro se" basis. The niece's husband filed a disciplinary complaint against the lawyer. The disciplinary court rejected the lawyer's argument that the husband was a former client and thus Rule 1.7 did not apply. It found that as a matter of fact, there was an overlap of several weeks during which the lawyer was still counsel of record for the niece's husband—seeking immigration status for the wife based on the existence of the marriage, while at the same time representing the niece seeking an annulment of the marriage, albeit as "shadow" counsel. [45]

Although the court did not address the applicability of Rule 1.9, relating to former clients, it could have found that the lawyer was conflicted under Rule 1.9 because the annulment matter was "substantially related" to the husband's permanent residency case. Unfortunately for the lawyer, because she was also found to have engaged in

[44] See In Terence K. Sumpter et al. v. William B. Hungerford Jr. et al., Case number 2:12-cv-00717 (E.D.L.A. 2012) (Dkt. No. 149) (law firm that had implied lawyer-client relationship with regional center disqualified from representing EB-5 investors who sought compensation for poor return on investments when regional center project failed).

[45] It should be noted that the court did not address another possible conflict arising from the facts at issue, i.e., whether the annulment would be adverse to the lawyer's niece who had gained permanent residence through her husband. If an annulment means that the marriage was never valid, the annulment would create problems in any permanent residency matter based on that marriage. Here, the problem would arise either when the niece applied to remove conditions on her permanent residence if the marriage was less than 2 years old when she had been approved, or when she applied for naturalization.

other misconduct arising from the same representation, which included unauthorized practice, incompetent representation, and dishonest conduct in connection with the annulment case, she was disbarred.[46]

MR 1.7(a)(2)

MR 1.7(a)(2) provides that "A concurrent conflict of interest exists if:

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

MR 1.7(a)(2) covers conflicts other than those involving direct conflicts that are known at the outset of the representation. In MR 1.7(a)(2), conflicts that are merely potential at the outset may arise later during the course of the representation and may not be as easily identified as the "directly adverse" conflicts prohibited under MR 1.7(a).[47]

MR 1.7(a)(2) contains two interrelated elements: there must be a "significant risk" of a conflict and the conflict must be one that "materially" limits the lawyer's ability to fulfill his duty of competence and diligence to each affected client. The phrase "significant risk" is not defined in the rule, but as explained in Comment 8 as to current clients, it denotes more than a "mere possibility" that at some point the respective clients' interests will differ. The phrase "materially limited" is also not defined in the rule, but as explained in the same comment, it applies to any circumstances in which a lawyer's ability to "consider, recommend or carry out an appropriate course of action …or 'foreclose' a course of action" on behalf of one client would be impaired by the lawyer's obligation to provide similar advice to another current client.

The determination of whether a concurrent conflict of interest would have a material limitation on the lawyer's ability to represent both clients with competence and diligence is extremely fact-specific. A common illustration involves a lawyer's simultaneous representation of an insurer in one matter, e.g., as a defendant in a declaratory judgment action and a plaintiff seeking damages in a different matter against a company covered by a policy from the insurer. As reflected in an ABA ethics opinion on that subject, representation of the plaintiff-client would not be directly adverse to the insurer-client, and therefore there would be no current client conflict, unless the insurer was a named party to the plaintiff's action or the circumstances were such that the lawyer might have to take testimony or discovery from the insurer that violated the lawyer's duty of loyalty to the insurer. The opinion noted, however, that a concurrent conflict could arise if it would be to the advantage of the plaintiff for the lawyer to reveal or use information relating to the representation of the insurer. In that scenario, the lawyer would have to seek the informed consent of each affected client, confirmed in writing, to waive the conflict if she reasonably believes she will be able to provide competent and diligent representation to both clients.[48]

Disciplinary Case – Potential Conflict of Interest

A recent Washington, D.C. decision makes clear that lawyers who represent multiple clients may be subject to professional discipline if they fail to obtain informed consent to foreseeable potential conflicts, even when there is no evidence of an actual conflict at the inception the representation.[49] In that case, two lawyers represented a mother and son in estate-planning disputes. In the first dispute, the son engaged the lawyers to represent him in a suit to reform a trust established by his mother to increase his inheritance at the expense of his sister and to

[46] See Attorney Grievance Comm. of Maryland v. Runan Zhang, Misc. Docket AG No.11 Sept. Term, 2013 (July 21, 2014).

[47] See, e.g., Wyatt's Case, 982 A.2d 396 (N.H. 2009) (in determining that lawyer violated conflict of interest rules in his representation of ward and ward's conservator and acted adversely to ward by aiding others in seeking a guardianship over him, court relied on principle that Rule 1.7(a)(2) "focuses not upon direct adversity at the outset, but the risk that direct adversity or other material limitations may arise in the course of the dual representation.").

[48] See ABA Formal Ethics Opinion 5-435 (where conflict between insurer's interest and that of the insured are not directly adverse, but lawyer's responsibilities to protect insurer's confidential information would materially limit lawyer's representation of the plaintiff-client to whom such information would be materially helpful, lawyer may not continue representation, without consent of the insurer and plaintiff-client).

[49] In re Szymkowicz, (D.C. Ct. App), No. BG-0884 (September 17, 2015).

remove his sister and her husband as trustee and successor trustee. While that suit was pending, the same lawyers were asked to represent the mother in a suit, supported by the son, to revoke the trust. The lawyers did not seek the informed consent to any conflicts between the mother and son purportedly on the basis that the mother and son's interests were aligned. By way of explanation, the lawyers argued there was evidence that the mother "wanted to provide financial security to the son." However, on the basis that there was a substantial risk that the mother and son's interests might diverge, e.g., if the elderly mother's competence was challenged, the court remanded the matter for determination, among other questions, as to whether the lawyer violated Rule 1.7(b)(2) as a matter of law and the implications of Rule 1.14. The Court also remanded a related complaint against the successor lawyers who took over the second suit after the two original lawyers withdrew due to concerns that they might be called as witnesses. In the second suit, the successor lawyers accepted "payment and direction" from the son. The court found that the successor lawyers may have violated [Wash. D.C.] Rule 1.7(b)(4), which governed conflicts of interest caused by a third-party's interest in the matter or the lawyer's own financial, business, property or personal interests. The successor lawyers also did not seek to obtain the informed consent of the affected parties.

We discuss, below, additional concurrent client conflicts in each of the settings articulated in MR 1.7(a)(2).

Conflicts Under MR 1.7(a)(2)

Current Client Conflicts

A current conflict of interest may be triggered when a lawyer is asked to represent two or more individuals in a transactional matter, such as forming a joint venture. While the interests of each of the individuals may be aligned at the beginning of the representation, in that the affected persons have the same practical goal, the terms of the joint venture may have different consequences to each of the parties. Accordingly, there would be a potential conflict that the lawyer's ethical obligation to advise one client as to the best terms or position applicable to him might be limited by the lawyer's same obligation to the other clients. A lawyer faced with those circumstances would have to determine the potential for material limitation based on factors such as the duration and nature of the lawyer's relationship with the client or clients, the services to be performed by the lawyer for each, the probability that disagreements may arise and the degree of prejudice to the client from the conflict.[50]

Simultaneous representation of co-plaintiffs or co-defendants in litigation may also trigger a conflict under MR 1.7(a)(2) where the testimony of each of the clients about key issues would be inconsistent or where the clients take incompatible positions in relation to an opposing party or in settlement of the claims or liabilities in question.[51] As noted in Comment 23, representation of co-defendants in criminal matters may be permitted if the requirements of MR 1.7(b) can be met. However, the potential for conflict of interest is so grave that such representation ought, as a general matter, be declined.[52]

A concurrent client conflict may also occur when a lawyer represents a corporation as well as one of its principals. If the principal reveals confidential information that may have a negative impact on the corporation, the lawyer will have a conflict between her duty of confidentiality to the principal and her duty of loyalty to the corporation. The reverse would also apply if the lawyer received confidential information from the corporation that would have a negative impact on the principal. Absent the informed consent of the affected parties, which would, by definition, permit disclosure of otherwise confidential information, the lawyer would have to withdraw

[50] See Comment 26 to MR 1.7.

[51] See Comment 23 to MR 1.7; In re Neuhardt, Mont., No. 13-0070 (April 1, 2014) (criminal defense lawyer who jointly represented a married couple during early stages of drug investigation where wife acted as a cooperating witness against the husband, suspended based on violation of Rule 1.7; court found lawyer's representation of target and inculpatory witness demonstrated failure to appreciate conflicting interests of the spouses; whether conduct actually prejudiced husband not relevant under rules of professional conduct).

[52] Id.

from the representation of both the corporation and the principal.[53] As discussed, if the lawyer discharged one of the clients, MR 1.9 (former client conflict of interest) would come into play.

There are also circumstances under which a lawyer's taking inconsistent legal positions in different tribunals at different times on behalf of different clients may create a prohibited conflict of interest (sometimes referred to as a "positional conflict"). A conflict may occur if there is a significant risk that a court decision favoring one client will create a precedent likely to undermine the position taken by the lawyer on behalf of the other client.[54]

Factors to be considered when deciding whether the positional conflict is waivable include whether the two matters are being litigated in the same jurisdiction, whether the affected clients may become concerned that the lawyer has divided loyalties, or whether there is a likelihood that the lawyer may be successful in both cases, notwithstanding the assertion of contrary legal theories.[55] The positional conflict under MR 1.7(a)(2) generally would not apply to a lawyer who only testifies as an expert witness; the relationship between the expert and the party is not deemed to be one of lawyer-client, triggering the duty of loyalty.[56] Arguably, a positional conflict of interest might arise where a lawyer advises a current client to invest in another client's company.[57]

Other scenarios involving current client conflicts under MR 1.7(a)(2) include situations in which the lawyer has relevant confidential information about one client, which he may not disclose, under MR 1.6, to the other client.[58] In the immigration context, a lawyer jointly representing both spouses in a marriage-based permanent residency matter may be made aware of confidential information concerning one spouse that may have a negative impact on the other spouse and underlying petition itself. *We discuss a conflict of interest in a marriage-based permanent residency matter in detail in Hypothetical One at pp. 6-38.*

A lawyer jointly representing the employer and employee in an employment-based permanent residency matter may be made aware of something adverse in the employee's immigration history or the employer's financial history that may have a negative impact on either client or the petition. For example, the lawyer may learn that the employee has a criminal conviction that the employer does not know about, or that the employer may soon have to lay off workers, and the employee does not know this. The lawyer would have a current client conflict.

Writer's note: *We discuss conflicts of interest in employment-based permanent residency matters in further detail in Hypotheticals Three, Four and Five at pp.6-42 through 6-46.*

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[53] See, e.g. California Bar Formal Op. 2003-163 (on the basis of California's analogous conflict of interest Rule 3-310, among others, opinion concludes that in absence of a joint representation agreement or other informed consent to disclosure of confidential information between the corporation and its principal, lawyer who learns from principal that he has engaged in sexual harassment of corporation's employees may not disclose that information to corporation and must instead withdraw from further representation of the corporation, based on the assumption that the lawyer's representation includes identifying and assessing potential claims against the corporation).

[54] See Comment 24 to MR 1.7; Steelworkers Pension Tr. v. The Renco Grp., (W.D. Pa., No. C.A. 16-190 (July 7, 2016) (motion to disqualify on basis of "issue" or "positional" conflict of interest denied, where movants failed to identify any specific pending lawsuit in which a successful result would adversely affect another client's interest; none of the other lawsuits were in same jurisdiction and none involved particular legal issue in dispute in the instant action).

[55] See ABA Formal Ethics Opinion 93-377 (October 16, 1993) (no per se prohibition against advocating contrary legal positions in representation of current clients, but in such cases lawyer should determine whether the outcome of one action would create legal precedent fatal to another client's case).

[56] See ABA Formal Ethics Opinion 97-407 (May 13, 1997) (no conflict arises from testifying as expert witness for party unless expert obtains confidential information from party triggering duty of confidentiality which may subsequently create a conflict if the expert represents party in matter adverse to the first party).

[57] In re Twohey, 727 N.E. 2d 1028 (Ill. 2000) (lawyer improperly advised client to invest in another client's company).

[58] See, e.g., In re Shay, 756 A.2d 465 (D.C. 2000) (substantial risk of material limitation where lawyer represented married couple in estate planning and knew that husband had not finalized divorce from first wife and was still married); see also Comment 27 to MR 1.7.

A lawyer jointly representing a regional center and the investor in an EB-5 permanent residency case may learn that there are problems with the project which may have a negative effect on the petition which the regional center does not want the lawyer to disclose to the investor. The lawyer would be faced with a current conflict of interest. We discuss a conflict of interest in an EB-5 matter in further detail in Hypothetical Six.

A lawyer jointly representing the CEO of a foreign-owned company located in the U.S. and a number of foreign employees in obtaining E-2 Visas may learn information about the CEO's desire to obtain permanent residency which would have a negative impact on the foreign employee's status. If the CEO instructed the lawyer to keep this information confidential, the lawyer would have a current client conflict of interest. We discuss a conflict of interest in an E-2 Visa matter in further detail in Hypothetical Seven.

A lawyer who jointly represents one spouse in a U-Visa matter and the other spouse derivatively may learn information that will negatively affect the derivative spouse. For example, the petitioner spouse may advise the lawyer of the intention to divorce. If the petitioner spouse refuses to permit the lawyer to advise the derivative, the lawyer would have a current client conflict. We discuss a conflict of interest between a principle U status petitioner and the derivative in detail in Hypothetical Two.[59]

MR 1.7(a)(2) is broader than MR 1.7(a)(1) in that it applies not only to conflicts between current clients discussed above, but also conflicts involving former clients, non-represented third parties, or those conflicts arising from a difference between the lawyer's personal interests and the legal interests of the client, all of which we discuss below.

Former Client Conflicts[60]

The duty to avoid conflicts of interests under MR 1.7(a)(2) applies to matters in which the interests of a former client may impair the lawyer's exercise of professional judgment on behalf of a current client.[61] Under MR 1.9, which is less restrictive than MR 1.7, a lawyer may represent a current client in a matter against a former client as long as the subject matter of the current case is not the same as or "substantially related" to the former case.[62] Legal matters may be substantially related even if they are factually distinct, in particular if there is

[59] We also discuss in further detail conflicts of interest that arise in dual or joint representation in the "Special Concerns" section at pp 6-31. Topics include family-based, employment-based and investor-based permanent residency matters and waivers of potential conflicts of interest.

[60] A lawyer who believes she has a conflict involving a former client should be mindful of MR 1.9 (concerning duties to former clients) and should check the state's version of this rule. Generally, MR 1.7(a)(2) protects the loyalty interest of the current client in a matter in which a former client is involved and MR 1.9 protects the confidentiality interest of the former client. And MR 1.18 protects the interests of the prospective client, which will be addressed in a forthcoming chapter. Current clients are owed the highest degree of protection (MR 1.7) followed by protections owed to former clients (MR 1.9), and prospective clients the least amount of protection, requiring that information received from the prospective client be "significantly harmful" to him or her (MR 1.18).

[61] See Comment 33 to MR 1.7, which references MR 1.9 (obligations to a former client). The client also has the right to discharge the lawyer as stated in Rule 1.16.

[62] MR 1.9 provides in pertinent part:

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing…

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

See also, Dougherty v. Philadelphia Newspapers LLC, Pa. Supreme Court, No. 104 2013 (February 11, 2014) (law firm that previously represented labor leader in connection with public corruption probe is conflicted from representing media

evidence that the lawyer has actual knowledge of the former client's confidential information, e.g., if a new client wants to bring a collection action against a former client who defaulted on a loan.[63] As in MR 1.7, MR 1.9 permits some conflicted representations if the lawyer obtains written informed consent from each of the affected clients.

One of the protections afforded the former client under MR 1.9 is that a lawyer's duty of loyalty endures. This continued duty prevents a lawyer from attempting to resolve a prohibited current client conflict under MR 1.7(a)(2) by simply dropping the less favored client.[64]

In the immigration context, a lawyer may find himself subject to a former client conflict if after successfully completing an employment-based permanent residency matter in which the employee beneficiary has moved on, the employee beneficiary seeks to engage the lawyer to file a DOL complaint against the previous employer for failure to pay the required H-1B wage.

Although not mentioned specifically in MR 1.7(a)(2), conflicts of interest that arise out of a lawyer's duty of confidentiality to prospective clients (as defined in MR 1.18) overlap with those under MR 1.7.[65] Because under MR 1.18, a prospective client is entitled to the same confidentiality protections as those afforded a former client,

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defendant whom labor official sued for defamation, claiming that the newspaper smeared him when he ran for public office where law firm's prior representation "substantially related" to pending lawsuit); Bollinger v. Cudmore, Wash. Ct. App. Div. 3, No. 33193-8-III (July 12, 2016) (court disqualified lawyer who violated duty to former estate-planning client by helping another oppose a restraining order to stay away from the dementia-suffering man without obtaining the informed consent of the man's guardian; court found lawyer violated Rule 1.9).

[63] See Comment 3 to MR 1.9, which provides in pertinent part as follows: "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would *normally* have been obtained in the prior representation would materially advance the client's position in the subsequent matter…. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in *ordinary practice* be learned by a lawyer providing such services." (Emphasis added) See. e.g., Philadelphia Bar Assoc. Ethics Op. 2016-3 (June 2016) (lawyer who represented businesswoman former client on various matters over a seven-year period prohibited from representing new client lender in a collection suit against the former client because the lawyer was familiar with the former client's mindset toward collection matters); see also Charles W. Wolfram, Former-Client Conflicts, 10 Geo. J. Legal Ethics 677 (1997). (Discussion of type of former client confidential information known as the "playbook view," which refers to situations where a lawyer has learned how a client approaches - or specific employees of the client approach - legal matters, thereby giving the lawyer a supposed advantage when opposing that person or entity as a former client).

[64] See note [36] supra, regarding "hot potato" doctrine. It should be noted that the "hot potato" doctrine may be distinguished from what has been described as the "thrusted" or unforeseen conflict doctrine which carves out a set of circumstances under which a lawyer may ethically be permitted to withdraw from the representation of only one of the clients in a dual client representation. See NYC Bar Ethics Op. 2005-05 "circumstances would include a conflict that: arose through no fault of the lawyer, was not reasonably foreseeable at the outset of the representation, did not involve the exposure of material confidential information, and that cannot be resolved by the consent of the clients, among others." The "hot potato" doctrine may also be distinguished with the "accommodation client doctrine." See Allegaert v. Perot, 556 F.2d 246 (2d Cir. 1977); Rite Aid, 139 F. Supp. 2d 649 (E.D. Pa 2001).

[65] See Rule 1.18, Duties to Prospective Client, which provides in pertinent part:

(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter.

Lawyers are advised, as always, to check the applicable state version of any ABA Model Rule. Here, for example, we note that Texas does not have a comparable rule concerning conflicts of interest with prospective clients. See Tex. State Bar Prof'l Ethics Comm., Op. 651 (November 2015) (where Texas rules do not require that firm websites include confidentiality disclaimers, law firms whose website invites users to email information need not keep such responses confidential if website features a disclaimer and requires that clients check "accept" before emailing information, and may use confidential information adversely to the email user who would not have reasonable expectation of confidentiality).

lawyers must take steps when dealing with prospective clients to avoid receiving confidential information in the event the lawyer is not retained.[66] As a general matter, lawyers who seek to avoid running afoul of obligations set forth in MR 1.18 should keep accurate records of all contacts with prospective clients.[67]

Third-Party Conflicts

Depending on the circumstances, a lawyer's exercise of professional judgment on behalf of a current client may be compromised by the lawyer's interaction with a third-party, especially when the third-party pays a current client's legal fees.[68]

Although there is no prohibition against payment of fees or expenses by third-parties (including payment of the entire fee by a co-client), MR 1.8(f), which is referenced in Comment 13 to MR 1.7, imposes some reasonable limitations. MR 1.8(f) requires that (1) the client must give informed consent to payment of his legal fees by another, (2) there be no interference with the lawyer's independent judgment or the lawyer-client relationship and (3) any information relating to the relationship be kept confidential from the third-party as would be required under MR 1.6.[69]

Notably, MR 1.8(f) does not require the client's written consent to a third-party's payment of the legal fee. In the disciplinary context, a Utah court held that the burden of proving the absence of consent fell on the client.[70] In the particular case at hand, because the client provided no testimony or other evidence that she failed to consent, the court reversed the disciplinary committee's earlier finding that the lawyer had violated Rule 1.8(f). The court did remind lawyers in a footnote that where a third-party payment triggers a conflict of interest, consent must be

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[66] See, e.g, Vermont Advisory Ethics Opinion 2000-10 (Under Rule 1.7 and 1.9, lawyer who disclosed a potential conflict to caller who sought to retain lawyer by divulging general nature of employer-employee disagreement, potential litigation and name of employer [now a prospective client], is not disqualified from representing employer where lawyer explained to caller that a conflict existed and caller would have to seek legal representation elsewhere; however, lawyer may not inform employer of telephone call and its content, identity of caller or nature of call to current client without consent of current client and prospective client, if confidential information imparted to lawyer by prospective client); Jimenez v. Rivermark Cmty. Credit Union, D. Or., No.3:15-CV-00128-BR (May 12, 2015) (law firm not disqualified from representing defendant under Oregon's version of Rule 1.18, as there was no implied lawyer-client relationship between the debtor-plaintiff and the firm on the basis of a telephone inquiry from the plaintiff where lawyer advised plaintiff that it did not handle the type of case alleged, that it frequently represented creditors in collection matters and the lawyer did not receive "significantly harmful" information as defined by that rule); In re Marriage of Newton, Ill. App. Ct. 1st Dist., No. 1-09-0683 (June 30, 2011, published October 14, 2011) (law firm that represented wife in divorce after initially consulting with husband who did not retain firm, disqualified on basis that lawyer-client relationship between firm and husband had been established and firm advised wife upon retention that there was a conflict of interest; law firm denied fees for work performed prior to disqualification); Cargould v. Manning, Ohio Ct. App. 10th Dist., No. 09AP-194 (November 5, 2009) (lawyer who may have met once with a husband about a divorce case and allegedly learned unspecified sensitive information from him is not disqualified representing wife in same action where husband failed to provide evidence from which to conclude that he had actually met lawyer or provided confidential information).

[67] Under MR 1.18, when a prospective client conflict is involved, the disqualified lawyer can normally be screened, thereby preventing disqualification of the lawyer's firm. If the conflict involves a concurrent conflict under MR 1.7 or MR 1.9, screening is not allowed, except in the narrow case where a lawyer moves to another firm. For a comprehensive discussion of MR 1.18, lawyers should review the upcoming EC Chapter for that rule, which references MR 1.9.

[68] See Comment 13 to MR 1.7.

[69] See MR 1.8(f).

[70] See Reneer v. Utah State Bar, Utah No. 20120760 (May 23, 2014) (despite reversing issuance of private admonition on the basis that the client failed to meet her burden of proof that she did not consent to third-party payment under Rule 1.8, court cautioned in a footnote that written consent would have been required in "situations where third-party payments also constitute a conflict of interest under Rule 1.7"). Notably, the court did not address other possible rule violations, such as aiding the unauthorized practice of law by the for-profit referral service who paid the lawyer the $2000 legal fee from $6000 in funds the referral service received from the client as the total fee.

confirmed in writing.[71] Good practice would be to address applicable third-party payments in an engagement letter.

Third-parties, whether or not they pay the fee, may attend consultations with a client to provide emotional support or other help. When dealing with such persons—even close relatives—the lawyer must be clear in identifying the client at the outset of the representation and clarifying the difference between the actual client and the party assisting the client, in particular as it relates to confidential information. Though this is extremely common in immigration cases, the prudent and conscientious immigration lawyer should take precautions to preserve the lawyer-client privilege when nonessential parties attend meetings with clients consistent with the applicable state and federal law concerning lawyer-client privilege.[72] One such precaution would be to have the third-party family member or friend be appointed in the engagement agreement (or other writing) as an agent for the client for the purpose of giving and receiving communications between the lawyer and the client.

Third-Party Conflicts in Immigration Context:

As most immigration lawyers who handle employment-based residency matters know, Department of Labor (DOL) regulations require the employer to pay the lawyer's fees for labor certification applications whether or not the lawyer represents both the employer and the employee. Where the lawyer represents the employer only, the lawyer must make clear that the employee is essentially a third party for conflict purposes. Unless there is consent to dual representation, the employee must have a clear understanding that he cannot look to the lawyer for legal advice, access to the employer's confidential information or request that the lawyer take action that protects the employee's interests if they are adverse to the employer's. The prudent and conscientious lawyer should be concerned that it may not be practical to represent only the employer and not the employee in these cases if the employee doesn't have his or her own lawyer. In this regard, MR 4.3 would require that a lawyer take special precautions in interacting with an unrepresented party in a legal matter for which the lawyer is providing representation to a client. Good practice in such situations would include a written statement to the unrepresented person signed by that person clarifying the lawyer's role. For example, a lawyer may explain the nature of a document to be signed without providing legal advice.[73]

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[71] See Comment 12 to MR 1.8 which notes that MR 1.7(b)(2) requires that the lawyer obtain the affected parties' informed consent to a conflict of interest in writing.

[72] Attorney-client privilege is more likely to be upheld where the non-party who attends a lawyer-client meeting provides assistance to client or lawyer by, for example, providing emotional or communication support. Notably analysis of the viability of lawyer-client privilege is very fact sensitive. See, e.g., (State v. Sucharew, 205 Ariz. 16 (Ct. App. 2003) (parents of a witness who faced criminal charges sat in on conversations with the lawyer and provided advice and guidance to their son did not invalidate attorney-client privilege where parents had "an understandable parental interest and advisory role in their minor's legal affairs."); (State v. Shire, 850 S.W.2d 923 (Mo. Ct. App. 1993) (defendant charged with second degree murder found to have waived the attorney-client privilege because of daughter's presence at meeting with her family law attorney, where daughter not essential in conveying information to lawyer and not reasonably necessary to protect mother's interests at meeting); Stroh v. Gen. Motors Corp., 213 A.D.2d 267 (1995) (attorney-client privilege upheld where daughter, who attended elderly mother's meeting with lawyer concerning traumatic event, chose the law firm for mother, transported her to meetings, put her at ease, provided relevant information and mother thus had a reasonable expectation of confidentiality and daughter was in effect acting as her agent). For further discussion of the lawyer-client privilege, see EC for MR 1.6 at pp. 5-1.

[73] MR 4.3, entitled "Dealing With Unrepresented Person: Transactions With Persons Other Than Clients" provides as follows:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

See also Comment 2 to MR 4.3 for further explication.

Another third-party immigration practice example might involve a situation where an immigration lawyer is asked to represent a foreign national by a relative or friend who is also paying the fee. Although the relative's or friend's interests may initially be aligned with those of the client with respect to obtaining immigration relief, the friend or relative may also have an interest in minimizing the cost of the representation and attempt to pressure the lawyer to take steps that may not be in the client's best interest or otherwise be involved in strategic decisions. Such actions, if not rejected, might affect the lawyer's ability to provide competent and diligent representation.[74]

Personal Interest Conflicts

A lawyer's personal interests, which include financial interests, professional interests and the interests of family members or friends may present a conflict of interest prohibited under MR 1.7(a)(2).[75]

Financial Interest Conflict:

A conflict triggered by a lawyer's financial interest may arise if the lawyer posts a bond for the client and later has concerns about recovering the funds advanced. This concern may impair the lawyer's ability to exercise professional judgment on behalf of the client.[76] Indeed, any situation in which a lawyer would obtain a financial benefit as a result of the representation, other than the legal fee, would also trigger a potential conflict.[77] In real estate transactions, for example, a lawyer could not ethically receive a commission from the seller (in his capacity as a broker) and at the same time represent the bank.[78] A personal/financial interest conflict might also arise when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, in that the lawyer's duty to provide competent and diligent representation on

[74] See Comment 11 to MR 1.8 which also references Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[75] See Comment 10 to MR 1.7 ("a lawyer may not allow related business interests to affect representation"); Virginia Legal Ethics Opinion 1799 (June 30, 2004) (where prosecutor's former partner shares an interest in real estate with prosecutor, prosecutor is barred from conducting prosecutions in which former partner serves as defense counsel; business connection is directly related to law practice of defense attorney and therefore amounts to a personal interest conflict, not subject to informed consent under special circumstance set forth in law; Nebraska Ethics Advisory Opinion for Lawyers No. 06-12 (no per se violation of Rule 1.7 for prosecutor father and defense counsel son to be opposing counsel, but son must determine whether father-son relationship would impair ability to competently and diligently represent client; if so, then son must decline representation, if not, then son must obtain client's informed consent prior to actual representation); see also Comment 12 (concerning personal interest conflict arising from sexual relationships with clients and Rule 1.8(j)).

[76] See ABA Formal Ethics Opinion 04-432 (January 14, 2004) (notwithstanding many cited state bar opinions to the contrary, ABA concludes there is no per se prohibition against a lawyer advancing funds or subjecting assets to the risk of loss with respect to a client's bail bond; however, except in rare circumstances, for example, where amount of funds needed is negligible, the lawyer is a friend of the family and reasonably expects to be reimbursed, where lawyer agrees in writing or otherwise that he would not exercise right of recourse or there is little or no risk that client will not appear, lawyer should conclude taking such action would be improper).

[77] See Matter of Gordon, 36 A.D.3d 154 (N.Y. App. Div. 1st Dept. 2006) (lawyer disbarred by resignation for wrongly receiving "commissions" from tax shelter programs to which he referred clients without disclosing financial arrangement to clients or his firm).

[78] See, e.g., Nassau County Bar Op. 2007-01 (lawyer's right to broker's commission gives the lawyer a financial stake in the transaction and creates a potential conflict of interest between himself and the bank, his legal client).

behalf of the client may be impaired.[79] Notably, under MR 1.10 personal interest conflicts are not imputed to other members of the firm under 1.10 and are subject to informed consent.[80]

Financial Conflict of Interest in Immigration Context:

An example of a financial interest conflict in the immigration context was addressed in a Washington, D.C. Ethics Opinion about the propriety of a lawyer executing an affidavit of support (either jointly or independently) on behalf of his client.[81] As noted in the opinion, such affidavits are legally enforceable against the sponsor/affiants, require disclosure of detailed information about the affiant's own finances and the affiant-lawyer's obligation could extend years beyond the successful adjustment of status. Accordingly, the opinion advised that even a lawyer who was motivated solely by the genuine desire to help a client would still have to consider conflict of interest implications for the following reasons:

> Such an undertaking to a client is fraught with peril…A lawyer has a conflict of interest under [Wash. D.C.] Rule 1.7(b)(4) if "[t]he lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third-party or the lawyer's own financial, business, property, or personal interests." The significant financial obligations imposed by the Affidavit of Support can create exactly the kind of conflict addressed by this rule. A lawyer who has second thoughts or a change in financial circumstances, for example, may have an incentive to sabotage the client's immigration application so that the lawyer's support obligations never can take effect.

The opinion recommended that when a lawyer wishes to assist a client by executing an affidavit of support, the lawyer must withdraw from the representation in accordance with Rule 1.16 [on the basis of the conflict] and refer the client to other counsel, not in the same firm, to avoid imputation under Rule 1.8(d) (same as MR 1.8(k)).[82] It should be noted that generally "of counsel" lawyers are considered as part of the firm for conflict of interest purposes.[83]

Professional Interest Conflict:

On one hand, a lawyer who is the subject of a disciplinary complaint filed by a current client may be conflicted by the lawyer's professional interest in defending against the complaint, while on the other hand,

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[79] See, e.g., Wash. D.C. Ethics Op. 367 (July 2014) (very helpful opinion concluding there is often no "bright-line" regarding propriety of seeking employment that triggers personal conflict of interest prohibition, but lawyer's reasonable belief that he can provide same level of competent and diligent representation must be based on both subjective belief and objective test, and factors include the lawyer's level of activity in representation, whether lawyer's interest in prospective employer is targeted and specific, and whether prospective employer has reciprocated); ABA Formal Ethics Op. 96-400 (January 24, 1996) (absent client consent, lawyer may not pursue employment discussions with opposing party or counsel to opposing party when such discussions are reasonably likely to interfere with the lawyer's professional judgment).

[80] MR 1.10(a) provides in pertinent part as follows:

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, *unless*

(1) the prohibition is based *on a personal interest of the disqualified lawyer* and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm. [Emphasis added]

[81] Wash. DC Ethics Op. 354 (March 2010) (comprehensive discussion of propriety of immigration lawyer executing Joint Affidavit of Support on behalf of client finding it impermissible under exceptions noted in Rule 1.8(e) (financial assistance/business transaction) and MR 1.7's prohibition of conflicts that would adversely affect lawyer's professional judgment on behalf of client based on lawyer's conflicting financial interests).

[82] See Vermont Advisory Opinion 1999-05 (lawyer who practices in one firm may associate with another firm simultaneously, but under Rule 1.10 concerning imputed conflicts of interest, the two firms will be considered as one entity for conflicts purposes; incumbent on two firms to develop procedure for screening conflicts).

[83] See Jean L Batman, Harold Gwyn Wren and Beverly Glascock, "Of Counsel: A Guide for Law Firms and Practitioners, Fourth Edition" available at https://shop.americanbar.org/eBus/Store/ProductDetails.aspx?productId=215507.

simultaneously attempting to provide competent and diligent representation to the client.[84] Similarly, a lawyer who has committed a material error in the handling of the client's matter may be faced with a conflict between his professional interest in avoiding liability and his duty to keep the client apprised of relevant developments in the matter to enable the client to make informed decisions as required by MR 1.4.[85] The professional conflict created by the lawyer's duty to inform his client of his own material errors may also arise when such errors are committed by co-counsel or even another lawyer with whom the reporting lawyer had a personal or other professional relationship.[86]

Professional Interest Conflict in Immigration Context:

In the immigration context, a professional conflict of interest may be triggered if the lawyer makes a mistake, e.g. which results in an order of removal. The lawyer has a duty to inform the client about matters important to the representation under MR 1.4 and a duty of diligent representation under MR 1.3. Both rules would require not only that the lawyer inform the client about the mistake, but also that he advise the client that the mistake could be a basis for an ineffective assistance of counsel motion to reopen.[87] A lawyer who wanted to continue with the representation would have a professional conflict given that the filing of such motions would require proof that the client has also filed a complaint with the appropriate disciplinary authorities. The lawyer's professional interest in minimizing the extent of the mistake to avoid discipline might interfere with the client's interest in making the case for ineffective assistance of counsel. Additionally, the lawyer might be called as a witness.[88]

An example of a professional interest conflict in the immigration context was addressed in a Pennsylvania ethics opinion.[89] The facts at issue concerned an immigration lawyer who represented an asylum applicant in a case pending in immigration court. The lawyer employed the applicant as a translator and filed a labor certification application with the Department of Labor that would support an application for adjustment of status to permanent residence under INA Section 245(i) available at the time. The immigration judge raised the question of whether the lawyer's representation amounted to a prohibited conflict of interest. In determining whether the lawyer had a conflict of interest under Rule 1.7, the Bar committee advised that the lawyer would have a conflict of interest if his representation of the client was materially limited by his own interests as the client's employer. The Bar concluded that where, as it appeared, both the client and the lawyer had the same interest in the client's continued employment for adjustment of the client's status, the lawyer's representation of the client would not be materially limited by his interest in employing the client. The Bar noted, however, that the conclusion would be different if the lawyer no longer wished to continue to employ the client. Given that the client's termination would

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84 See, e.g., ABA Formal Ethics Op. 94-384 (1994) (no per se requirement that lawyer withdraw from representation due to conflict arising from opponent filing disciplinary complaint, but if lawyer's interest in avoiding discipline could materially limit representation, lawyer must reasonably conclude that representation will not be adversely affected and then must seek client's consent); see also e.g., Jamieson v. Slater, No. Civ 06-1524-PHX-SMM, WL 3421788 Ariz. Nov. 27, 2006) (non-consentable personal conflict where lawyer is co-defendant as well as counsel for other defendants); Kentucky Bar Ethics Opinion E-435 (November 17, 2012) (criminal defense lawyer conflicted from providing advice to client regarding waiver of claim to ineffective assistance of counsel in proposed plea bargain because of obvious self-interest).

85 See, e.g., Colorado Ethics Op. 113 (November 19, 2005, modified July 18, 2015 solely to reflect 2008 amendments) (lawyer has ethical obligation to disclose material error and obtain client's informed consent to continued representation in accordance with Rule 1.7(b)(1) and (b)(4)); California Bar Ethics Op. 2009-178 (lawyer who wants to include limitation of malpractice liability in fee dispute settlement has a professional/financial conflict of interest in continuing representation unless client is represented by independent counsel in connection with fee dispute settlement).

86 See, e.g., New York State Bar Assoc. Ethics Op. 1092 (May 11, 2016) ("lawyer must disclose to the client information that the lawyer reasonably believes reveals that another lawyer, also representing the client, has committed a significant error or omission that may give rise to a malpractice claim," despite lawyer's professional interest in maintaining good relationship with co-counsel under MR 1.7 and MR 1.4).

87 See Matter of Lozada, 19 I&N Dec. 637 (BIA 1988).

88 See MR 3.7, Comments 6 and 7.

89 See Philadelphia Bar Ethics Op. 02-1 (2002).

adversely affect his ability to adjust his status through employment, the lawyer's ability to provide competent and diligent representation could be materially limited by his own desire to terminate the employment.[90]

A professional interest conflict that immigration lawyers may confront might arise if two lawyers sit on the board of a non-profit or bar association. As they will owe a fiduciary duty as board members to each other, that duty may interfere with the fact that they are also competitors. If one of the board member's clients has an ineffective assistance of counsel grievance against a colleague on the board, the lawyer may face a personal interest conflict about filing such a complaint.

Conflict of Interest to Engage in Sexual Relations with Client after Commencement of Representation:

Lastly, a prohibited personal interest conflict would most certainly arise under MR 1.7(a)(2), if a lawyer begins a sexual relationship with a client after commencement of the representation, where consent to such a conflict could rarely be deemed informed.[91] Such relationships are also expressly prohibited under MR 1.8(j).[92]

MR 1.7(b)

MR 1.7(b) provides that a lawyer may represent a client in a matter burdened by a conflict only when all four of the requirements set forth in the rule are met.

MR 1.7(b)(2) and MR 1.7(b)(3) identify two types of conflicted representations that are prohibited per se; they are not subject to any exceptions. MR 1.7(b)(1) and MR 1.7(b)(4), in effect, are the exceptions in that they permit conflicted representations in all other matters under the articulated circumstances. *The most logical way to approach MR 1.7(b) would be to read MR 1.7(b)(2) and MR 1.7(b)(3) first.* Nevertheless, we discuss the sub-sections of MR 1.7(b) as they appear in the rule.

MR 1.7(b)(1)

MR 1.7(b)(1) provides that a lawyer may represent a client, notwithstanding a prohibited conflict of interest if:

"the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client."

In order to undertake or continue representation of a client where a concurrent conflict exists, the lawyer must reasonably believe in the first instance that she can still fulfill her duty of loyalty to each affected client. In particular, she must have a reasonable belief that she can adequately protect the interests of each affected client by providing the same level of competent and diligent representation as she would if she were only representing one client. For example, this would require the lawyer to be neutral between the clients, not favoring one over the other, if the lawyer had a prior relationship with one of the clients. As discussed in the Key Terms section earlier

[90] The opinion noted that the conflict of interest could come under the exception provided under Rule 1.7(b) if, among other things, the lawyer obtained the client's informed consent to the potential conflict. The opinion also addressed the application of the lawyer as witness rule, Rule 3.7, advising that if the lawyer were required to testify at the client's hearing, the lawyer would have to withdraw.

[91] See ABA Formal Ethics Op. 92-364 (July 6, 1992) (where opinion issued prior to amendment of MR 1.8 expressly prohibiting such conduct, ABA concluded that because of the danger of impairment to the lawyer's representation associated with a sexual relationship between a lawyer and client, the lawyer would be well advised to refrain from such a relationship: " If such a sexual relationship occurs and the impairment is not avoided, the lawyer will have violated ethical obligations to the client…[t]he client's ability to give meaningful consent is vitiated by the lawyer's potential undue influence and/or the emotional vulnerability of the client").

[92] As is always the case, lawyers should check the applicable state's version of the ABA Model Rules, including MR 1.8(j)'s prohibition of sexual relations with clients. For example, New York's Rule 1.8 has a per se prohibition of sexual relations only between a lawyer and client in domestic relations matters.

at pp.6-4 the standard applied is an objective one.[93] The analysis rests on the ability of the reasonable lawyer to recognize potential or actual conflicts at the outset of the representation. A lawyer's experience in handling certain kinds of matters will come into play. For example, an immigration lawyer who has experience in handling employment or marriage-based permanent residency matters must be able to anticipate substantive conflicts that may arise even where both affected parties have the best of intentions and desire to achieve a common goal. The reasonable lawyer should also carefully look out for potential conflicts by observing the clients for any signs of contention, antagonism to each other or distrust of each other or the lawyer.[94] Such factors should be red flags that may give the lawyer pause about going forward with the representation in the first instance.

Once the conflict is recognized, the lawyer's duty to protect each affected client's interest would, by necessity, include disclosing the nature of the conflict and discussing the pros and cons of representation burdened by the conflict. A lawyer could not reasonably believe she could provide competent and diligent representation without informing the affected clients about the potential or actual conflict in the first instance. This discussion would also be required to obtain each of the affected client's "informed" consent.[95] Of course, such discussions would have to be tailored to the client's ability to exercise proper decision-making, in particular where one client is a minor, impaired or does not speak or read English fluently.[96]

As discussed below, it would be unreasonable for a lawyer to believe he could provide competent and diligent representation in situations where the conflict is per se non-consentable, under MR 1.7(b)(2) or MR 1.7(b)(3), or because seeking informed consent would require disclosure of otherwise confidential information.

MR 1.7(b)(2)

MR 1.7(b)(2) provides that a lawyer may represent a client, notwithstanding a prohibited conflict of interest if:

"the representation is not prohibited by law."

As noted in Comment 16, if the representation is prohibited by law, it follows that the representation would be deemed "nonconsentable" even if the affected clients were willing to consent. In particular, a state's substantive law may prohibit a lawyer from representing co-defendants in a capital case or federal law may prohibit criminal defense representation by a former government lawyer. Under decisional law in some states, the ability of a governmental client, such as a municipality, to consent to a conflict of interest is limited.[97]

When a lawyer is disqualified by a court or tribunal because of a conflict, the lawyer is essentially prohibited by law from continuing with the representation. Notably, a lawyer who is disqualified on the basis of a conflict of interest is also prohibited from sharing a legal fee with a non-conflicted lawyer to whom the case may be referred.[98]

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[93] See, e.g., Vermont Ethics Opinion 2009-4 (in assessing possible conflict of interest involving former clients, analysis should be based on "objective standard …and does not depend upon the undefined and very general concept of 'appearance of impropriety'").

[94] See Comment 29 to MR 1.7.

[95] See Comment 14 to MR 1.7 which notes that some conflicts are deemed non-consentable and Comment 15 to MR 1.7 which makes clear the relationship between the standard of reasonableness and informed consent. (Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest.)

[96] For a comprehensive discussion dealing with representation of clients with diminished capacity, see EC for MR 1.14.

[97] See Comment 16 to MR 1.7 which notes in pertinent part that *"decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest."*

[98] See ABA Formal Opinion 474 (April 21, 2016) (fee arrangements under MR 1.5(e) are subject to MR 1.7; unless a client gives informed consent confirmed in writing, lawyer may not accept a fee when lawyer has conflict of interest that prohibits lawyer from performing legal services in connection with or assuming joint responsibility for the matter); see also New York State Bar Ethics Op. 745 (2001) (lawyer who is disqualified on basis of conflict of interest may not receive referral fee from

MR 1.7(b)(3)

MR 1.7(b)(3) provides that a lawyer may represent a client, notwithstanding a prohibited conflict of interest if:

"the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."

As noted in Comment 17, a representation in which concurrent clients are directly opposed to each other (e.g., plaintiff and defendant) in a court or other tribunal is also deemed "non-consentable" because of the "institutional interest in vigorous development of each client's position," which would be impossible in that circumstance. However, where parties who are otherwise antagonistic agree to try to resolve their differences outside of litigation, i.e., mediation of a divorce or in even a commercial dispute, the conflict may be consentable if the lawyer is otherwise able to comply with MR 1.7(b)(1) and MR 1.7(b)(4).[99]

In a special form of mediation, identified as a "collaborative law process," the affected parties and their respective lawyers commit to work cooperatively to reach a settlement, which is then submitted to a court as a final decree.[100] To insure the ethical commitment of the lawyers, the clients and their lawyers (essentially a binding four-way agreement) agree in writing that if the process is not successful, each of the lawyers will withdraw from further representation, including any subsequent court proceedings.[101] There is an argument that such arrangements create a conflict of interest in that the lawyer's commitment to withdraw from the representation amounts to an "impairment" of her ability to represent her client zealously,[102] however, the ABA and many state bar associations disagree.[103] The majority view is that clients' interests are protected precisely because, in the event that settlement is not achieved, each of the lawyers will withdraw and the clients are able to retain new counsel unencumbered by any conflict.[104]

MR 1.7(b)(4)

MR 1.7(b)(4) provides that a lawyer may represent a client, notwithstanding a prohibited conflict of interest if:

"each affected client gives informed consent, confirmed in writing."

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new lawyer since the disqualified lawyer is prohibited from participating in the representation); Maine Board of Overseers Bar Op. 145 (1994, "enduring as of 2013") (even without formal disqualification, lawyer with a former client conflict may not be compensated for referring non-conflicted lawyer); A.I. Credit Corp. v. Aguilar & Sebastinellli, Cal. Ct. App. 1st Dist., No. A101841 (November 25, 2013) (law firm disqualified on basis of former client conflict may not recover fees from a client after being removed as its counsel, even if new client was aware of conflict because former client did not consent).

99 See Comments 17, and also 23 to MR 1.7; see also Utah Ethics Advisory Opinion No. 05-03 (even under MR 1.7(a)(2), a lawyer who served as a mediator in a divorce action may not in his capacity as a lawyer draft the settlement and necessary court papers to obtain a divorce for the parties since the interests of the husband and wife still are directly adverse in litigation, and therefore not subject to informed consent.).

100 See ABA Formal Opinion 07-447 ("Ethical Considerations in Collaborative Law Practice").

101 Id.

102 See Colorado Bar Ethics Op. 115 (February 24, 2007) (concluding that collaborative law process agreements presents non-waivable conflict because of the lawyer's contractual obligations to the opposing party under the four-way agreement).

103 Id. (rejecting "suggestion that collaborative law practice sets up a non-waivable conflict under MR 1.7(a)(2)").

104 ABA Formal Ethics Op. 4-447 (August 9, 2007) (as long as client has given informed consent, collaborative law process agreement does not violate MR 1.7, but is rather a permissible limited scope representation under MR 1.2.); Connecticut Ethics Informal Opinion 09-01 (January 21, 2009) (collaborative divorce process four-way contractual agreement presents a waivable conflict of interest as long as lawyer satisfies Rule 1.4 by providing full disclosure of the ramifications of participation in the process, including its breakdown based on either good or bad faith disputes from the other party.).

Informed Consent

Consent alone will not satisfy MR 1.7(b)(4) if the consent is not informed. As discussed, "informed consent" is defined in MR 1.0(e) as referring to "an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." What constitutes adequate information about a conflict of interest varies from case to case and whether the conflict is deemed consentable or "waivable" in the first instance. As noted above, representations that are prohibited by law or involve clients who are directly adverse in litigation are non-consentable. Conversely, as noted in Comment 28, in transactional non-litigation matters, although a lawyer may not represent multiple parties whose interests are fundamentally antagonistic to each other, "common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them."[105] In deciding the type and extent of information about the conflict to be disclosed, the lawyer should consider the client's experience in legal matters generally and experience in making decisions or whether the client or other person is independently represented by other counsel in giving the consent, in particular when consent involves the duty of confidentiality.[106]

The concept of informed consent interacts with the question of consentability in the first instance. Before a lawyer seeks a waiver, the lawyer must have a reasonable belief that he can fulfill his duty of loyalty which includes full disclosure of information necessary for "informed consent." The lawyer must do more than just tell the affected clients that there is a conflict and ask for consent.

A North Carolina lawyer was disciplined expressly because the waiver of a conflict he obtained from the seller and buyer in a complex commercial real estate transaction in an operating agreement was inadequate. The waiver, which was contained in the general operating agreement, stated only that "the parties have been advised that there is a potential conflict of interest among their individual interests."[107] The court found that without providing the affected parties with specific information identifying the types of conflicts that could occur, the buyer's consent could not be deemed informed. The underlying facts showed that the lawyer was privy to the seller's information that as counsel for the buyer he had a duty to disclose and which he failed to disclose.

The court's decision makes clear that informed consent as expressed in MR 1.7(b)(4) cannot be achieved unless the lawyer fulfills his obligation to keep his client fully informed of all matters that impact on the representation. This obligation cannot be met if the lawyer is otherwise precluded from disclosing confidential information.

Confirmed in Writing

When there is a conflict, under MR 1.7(b)(4) consent must not only be informed, it also must be confirmed in writing. Merely advising clients of a conflict without documenting the advice and receiving confirmation will not suffice.[108] Although not specifically expressed in MR 1.7, best practice would be for the writing to reflect the

[105] See Comment 28 to MR 1.7 ("… lawyer [may seek] to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.").

[106] See Comment 6 to MR 1.6 and Comment 18 to MR 1.7.

[107] N.C. State Bar v. Merrill, N.C. App., No. COA14-1334 (October 6, 2015) (lawyer suspended for two years for violating Rule 1.7's prohibition against conflict of interest and Rule 1.15-2(a)'s duty to safeguard client funds).

[108] See, e.g., Iowa Sup. Ct. Disciplinary Bd. v. Stoller, Iowa, No. 15-1824 (May 13, 2016) (lawyer who had been disqualified for failing to obtain informed consent confirmed in writing was also suspended based on representation of one client whose position was directly adverse to other clients who he represented in small claims court and where lawyer notified the small claims court clients in an email in which he also severed his relationship; in a second matter, lawyer represented landlord and tenant in a lease transaction but did not seek a conflict waiver until well after he began the conflicting representation).

lawyer's full discussion of the conflict with the affected clients to verify that the consent is informed.[109] Where the written agreement does not include the appropriate degree of specificity, the client may later claim that the lawyer did not provide sufficient facts and explanations to render the consent informed.

As discussed below, obtaining informed consent in immigration matters may be problematical if the client is not fluent in English or lacks sufficient educational background or understanding of the U.S. legal system.

Special Areas of Concern

Informed Consent or Waivers of Potential Conflicts, Practical Considerations Generally[110]

In cases of multiple representations, waiting to obtain a waiver until an actual conflict arises may have a negative impact on the lawyer-client relationship. The client may be disappointed or feel alienated by the lawyer's failure to alert the client to potential or actual conflicts at the inception of the representation. If the lawyer is required to withdraw and the client is required to retain new counsel, the lawyer may lose the clients permanently. For this reason, in cases involving multiple representation, prudent and conscientious lawyers consider seeking their clients' informed consent to potential conflicts that are foreseen. While some lawyers may refer to the waiver of a potential conflict as an "advance" waiver, the term more accurately describes waivers of *unforeseen* potential conflicts. For immigration lawyers, a waiver of a potential conflict would most often, as a practical matter, involve *foreseeable* future conflicts between or among clients. As noted below, irrespective of the terminology used to describe such waivers, lawyers should focus on avoiding "open-ended" waivers that by their nature do not provide sufficient information to enable the affected party to grant "informed consent." The more information the lawyer can provide about the factual underpinnings of a potential conflict, the more likely it will comply with MR 1.7.[111]

Accordingly, when a lawyer is seeking to obtain a waiver of potential conflicts, the lawyer must scrutinize the circumstances of the representation to determine (1) what information must be provided to the affected clients in order for the consent to be deemed informed and (2) whether, the lawyer may disclose relevant information without otherwise violating the lawyers' duty of confidentiality to the affected clients. If the lawyer cannot disclose the information necessary to obtain informed consent because the information is confidential, the lawyer cannot obtain the client's "informed" consent. Whether or not a waiver may be deemed effective depends on the extent to which the clients have given their full informed consent and whether the purported future conflict would otherwise be consentable under MR 1.7.[112] Clients must be provided with the same degree of information and

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[109] See Comment 20 to MR 1.7 (in large part, the "writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.").

[110] We use the terms "waiver" and "consent" interchangeably.

[111] See Comment 22 to MR 1.7; Nathan M. Crystal, Enforceability of General Advance Waivers of Conflicts of Interest, St. Mary's School of Law, Law Review Vol. 38, p. 863, Peter Jarvis, David Lewis, Allison Rhodes, & Calon Russell, Clearly Enforceable Future Conflicts Waivers, 30 ABA/BNA Lawyers' Man. Prof. Conduct 692 (Oct. 22, 2014) (practical discussion of conflicts waivers including model language); see also, e.g., Galderma Laboratories, LP. v. Actavis Mid Atlantic LLC, 927 F. Supp.2d 390 (N.D. Tex. 2013) (enforcing a future conflicts waiver given by a legally sophisticated business client after review by the client's in-house counsel and waiver included an "agreement to a course of conduct" for handling conflicts by specifying when the firm would and when it would not handle matters for other clients with adverse interests, explained the material risks of waiving future conflicts and the "reasonably available alternatives" by explaining that the client could retain other counsel); Macy's Inc. v. J.C. Penney Corp, Inc., 968 N.Y.S.2d 62 (App. Div. 1st Dept. 2013) (upholding future conflicts waiver that allowed counsel to represent Macy's adversely against J.C. Penney in action for tortious interference while counsel represented J.C. Penney in unrelated intellectual property matter at the same time).

[112] For example, New York State Bar Opinion 826 (2008) advised about advance waivers as follows:

> If the conflicts are otherwise consentable, there is sufficient disclosure of the nature of the conflicting representations that may arise and the client is capable of understanding the waiver, a lawyer or law firm generally may ethically request and rely upon the advance waiver of a future multiple-representation conflict. The extent of the disclosure necessary, and potentially the scope of the advance waiver, may

satisfy the same criteria as they would for a waiver of an existing conflict.[113] In particular, the lawyer must provide a detailed explanation of the type of conflict that might arise, including information about the other client's interests that could be adverse to the current client granting the waiver as well as the type of matters that might trigger a conflict.[114]

Because procurement of waivers of future conflicts involves a delicate balance of many factors, it is not surprising that the Comments to MR 1.7 expressly discuss the basic principles as follows:

> Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).[115]

> depend on, among other things, the sophistication of the client. For example, where a client is relatively unsophisticated in legal matters, an advance waiver is more likely to be enforceable if it is limited to lawsuits on behalf of the carrier of the same general kind as the lawyer or law firm is then prosecuting, as opposed to a more open-ended waiver.

See also North Carolina Ethics Opinion 2007-11 (2007) (once client gives informed consent to an advance waiver, he may not later revoke it unless he has good reason to do so or if the lawyer concludes that the conflict is no longer consentable).

[113] ABA Opinion 93-372 (undated) (lawyer may ask client to consent to a waiver of a future conflict so long as waiver meets all requirements of waiver of contemporaneous conflict and lawyer is able to describe conflict with sufficient clarity so that client could be fairly said to have given fully informed consent.); North Carolina Bar Opinion RPC 168 (April 15, 1994)(waiver of future conflict permissible under conditions set forth in ABA 93-372, which if complied with would be effective); New York State Bar Association Ethics Op. 990 (2013) (where lawyer has obtained written informed consent to concurrent conflict of interest in representing parties in negotiating a loan transaction, whether lawyer may also obtain informed written consent from clients that lawyer may represent one of the parties in any litigation pertaining to the loan transaction will depend on "the extent to which the lawyer is able to explain adequately the material risks of the proposed course of conduct and reasonably available alternatives, and on the sophistication of the client."); New York City Bar Opinion 2006-1 (2006)(lawyers could ask clients to consent to advance waivers that would permit a lawyer to represent clients with interests adverse to the current client so long as the client gives his fully informed consent, client confidences are fully protected, and the waiver passes the "disinterested lawyer test").

[114] See e.g., Brigham Young University v. Pfizer Inc. D. Utah, NO. 2:06-CV-890 TS BCW (September 29, 2010) (court held advance waiver obtained when client's (BYU) lawyer transferred to new firm not enforceable in litigation involving firm's newly acquired client (Pfizer), where plain language of waiver referred solely to conflicts with companies that the firm "currently" represented in patent and intellectual property matters; law firm disqualified); Mylan, Inc. v. Kirkland & Ellis LLP, W.D. Pa., Civ No. 15-581 (June 9, 2015) (advance waiver not enforceable in hostile takeover matter where advance waiver only identified potential conflicts in "litigation, arbitration or other dispute resolution" without any reference to "acquisitions"; on that basis, court found consent not to be informed and that acquisitions via hostile takeovers are inherently adverse under Pa. Rule 1.7).

[115] See Comment 22 to MR 1.7.

While, as noted in Comment 22, there are circumstances under which an open-ended waiver of potential conflicts conceivably could be deemed effective, they would be limited to instances in which the client is sophisticated and has experience in dealing with lawyers in similar matters.[116]An open-ended waiver is more likely to be effective if the client has engaged counsel with respect to such a waiver.[117] In the foregoing situations, there may be a presumption that the client understood the consequences of waiving future conflicts, notwithstanding that they were not expressly articulated in the waiver agreement. The conflict waiver must always satisfy the criteria set forth in MR 1.7.[118]

The prudent and conscientious lawyer who wishes to rely on waivers of potential conflicts, must not only be familiar with the basic requirements, but also should consider obtaining pointed guidance in formulating the language used in written waivers. Such guidance may be provided generally by bar association publications[119] or directly by professional responsibility lawyers who can prepare appropriate draft waivers or review a lawyer's proposed draft of a waiver agreement. The prudent and conscientious lawyer should consider including the following elements in any agreement to waive a current or potential conflict of interest:

(1) a clear identification of the client or clients the lawyer proposes to represent.

(2) a clear description of the work to be performed (scope of representation).

(3) a detailed, but clearly understandable, explanation of the facts creating the conflict (without disclosing confidential client information), and in the case of an advance waiver, a similarly detailed and understandable explanation of the facts which might arise during the course of the representation that would create a conflict.

(4) a description of the consequences of the waiver on the affected clients.

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116 See e.g., In re Shared Memory Graphics LLC, Fed. Cir., Misc. No. 978 (September 22, 2011) (advance conflict waiver in joint defense agreement concluded patent infringement action enforceable against one of the participants who brought motion to disqualify firm that had lawyer who represented one of the joint defendants in the prior litigation; even where consent language was arguably broad, splitting 2-1, and relying on Comment 22 to MR 1.7, court held agreement enforceable because the moving party was a sophisticated party and there was no lawyer-client relationship between the movant and the law firm at issue).

117 See Comment 22; ABA Formal Ethics Opinion 05-436 (2005) which stated as follows:

> Comment [22] supports a lawyer's seeking, and the effectiveness of, a client's informed consent to future conflicts of interest in the circumstances that are acknowledged by [ABA]Opinion 93-372. The Comment goes further, however, by supporting the likely validity of an "open-ended" informed consent if the client is an experienced user of legal services, particularly if, for example, the client has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation.

See also Oregon Ethics Op. 2005-122 (2005) (lawyer may obtain a blanket waiver of future conflicts from the state permitting him to proceed on behalf of private clients in unrelated civil matters as long as the lawyer adequately explains the material risks and available alternatives) See also State Comp. Ins. Fund v. Drobot, C.D. Cal. No. SACV 13-0956 AG (JCGx) June 24, 2016 (court denied reconsideration of prior disqualification against lawyers who simultaneously represented plaintiff in civil racketeering litigation and criminal defendant who pled guilty; several different waivers of conflicts executed over time found to be ineffective because (1) they contained incorrect descriptions of facts, (2) boilerplate language, (3) questionable terms, (4) when viewed collectively they contradicted one another; (5) were entered "late in the game" when obtaining new counsel difficult and expensive and therefore consent that was given deemed "not informed").

118 See, e.g., Lennar Mare Island, LLC v. Steadfast Ins. Co., E.D. Cal., No. 2:12-cv-02182-KJM-KJN (April 7, 2015) (open-ended waiver in client's nine-year-old engagement agreement was ineffective to permit the adverse representation even though matters were unrelated and client was large corporation with in-house counsel at time of waiver, where waiver should have been revised in light of expansion of representation over ensuing years; court found that law firm failed to revise waiver to identify new potential conflicts and waited until a potential conflict arose to assert that the client was bound by the original waiver).

119 See, e.g., Marian C. Rice, The Elements of Conflict Waivers, Volume 40 Number 2, available at http://www.americanbar.org/publications/law_practice_magazine/2014/march-april/ethics.html.

(5) in relation to point (4) above, where clients are consenting to joint representation, a clear disclosure that the information received from each client may not be withheld from the other.

(6) a description of the benefits of proceeding with the representation, notwithstanding the negative consequences of the conflict reflected in points (4) and (5).

(7) a statement describing the steps to be followed if circumstances arise in the future which render the conflict non-waivable or if one of the affected clients seeks to withdraw the waiver, including for example, a statement that the lawyer may continue to represent one of the parties or that if the waiver is deemed effective by the appropriate authorities, it will be binding.

(8) a statement acknowledging that each of the affected clients have carefully considered the pros and cons of the waiver, have been given the opportunity to consult with counsel, and whether the clients have in fact consulted with counsel.

It bears repeating that if the only way that a lawyer can provide sufficient information about the nature of the conflict would be to disclose the other affected client's confidential information, then as a practical matter the lawyer will not be able to obtain that client's informed consent to the conflict and would be precluded under MR 1.7 from going forward with the representation of either client. If the lawyer determines that the necessary information is not confidential and intends to seek a waiver in writing as required, the prudent and conscientious lawyer should provide as much information as possible. When a lawyer feels hesitant about expressly describing a particular conflict of interest scenario, that should be a red flag that the waiver may be deemed ineffective if the information is not provided.[120]

Waiver of Potential Conflicts of Interest in Immigration Matters[121]

An immigration lawyer who, for example, undertakes dual representation in family-based, employer-based or EB-5-based residency matters without obtaining each client's informed consent to potential conflicts that may arise does so at the lawyer's peril. Without a properly crafted waiver of potential conflicts, the lawyer may be required to withdraw from both representations and may also be barred from representing one of the clients in future matters if they are substantially related. As described above, the terms of such waivers must be explained to the client and confirmed in writing signed by each client or if there is a written representation agreement, the consent may be incorporated into the written agreement as well.

As a matter of best practice, immigration lawyers should always use written representation agreements that spell out the specific services to be provided, the fees to be charged, the obligations of the lawyer and responsibilities of the client and any other issues important to the representation, especially potential conflicts. The prudent and conscientious immigration lawyer should also consider limiting the scope of representation of the

[120] See State Comp. Ins. Fund v. Drobot (C.D. Cal., No. SACV 13-0956 AG (JCGx) (June 24, 2016) (in disqualifying plaintiff's counsel in complex civil racketeering action, where same counsel also represented defendant in criminal case, court found even if conflict deemed waivable under California's analogous conflict of interest rules, waivers did not provide sufficient information to satisfy informed consent requirement in that waiver language incorrectly described actions as "unrelated," large portions of the waivers contained boilerplate language lacking substance, and waivers contradicted one another and contained questionable terms).

[121] There is not universal agreement about the viability of waivers of potential conflicts of interest in immigration matters involving foreign national clients who may not be sophisticated or experienced in legal matters generally or whose decision-making ability is limited by educational or language barriers. For an expansive discussion of advance waivers in dual representation immigrations cases, see Karin Wolman and David Grunblatt, Walking the Line – Approaches to Dual Representation in the Immigration Context, AILA (2012) available at https://www.kwvisalaw.com/Walking%20the%20Line%20(2).pdf; see also Cyrus D. Mehta, Counterpoint: Ethically Handling Conflicts Between Two Clients Through the "Golden Mean" 12 Bender's Immigration Bulletin, 1147 (August 15, 2007); Bruce A. Hake, Advance Conflict Waivers are Unethical in Immigration Practice-Debunking Mehta's "Golden Mean," 12 Bender's Immigration Bulletin, 682 (June 1, 2007); Cyrus D. Mehta, Finding the "Golden Mean" in Dual Representation - Updated, 06-08, Immigration Briefings 1 (August 2006); Bruce Hake, Dual Representation in Immigration Practice, Ethics in a Brave New World, 28 (AILA 2004).

client under MR 1.2(c). For example, if the lawyer represents a corporation and its employees, the lawyer can limit the representation of the employee to obtaining the H-1B visa. Then, the lawyer is not required to advise the employee on other available options, such as permanent residency. As a general matter, immigration lawyers must take steps necessary to insure that clients who are asked to waive an actual or potential conflict have an adequate appreciation of what protections they are giving up by consenting to dual representation. A well-crafted waiver should also include a discussion of the consequences should an affected client seek to revoke the waiver.[122]

An example of a waiver of potential conflicts that clearly identifies the parameters of the waiver in an immigration context can be found in a recent case in which a major firm obtained an advance waiver from a foreign national business executive.[123] The business executive had agreed to invest in a U.S. textile company based on an alleged promise to give him substantial control of the company, but brought suit against the company after the business relationship failed. Some time prior to the lawsuit, while the firm was representing the company in the business negotiations, the firm agreed to assist the business executive in obtaining the appropriate visa to allow him to move to the U.S. with his family with the assistance of the company, but only on the condition that the business executive sign a waiver of any conflict of interest that might arise between the business executive and the company. The waiver expressly provided that in the event of a dispute between the clients, the firm would stop representing the business executive in the immigration matters and would represent only the company. In the waiver, the business executive expressly agreed that he would not use the firm's representation of him in the visa application matter nor the consent and waiver as a basis on which to disqualify the firm from representing the company. In support of the disqualification motion, the business executive argued that the law firm engaged in an impermissible conflict of interest. He argued that the waiver was not enforceable because his consent was not "informed" on the basis that he had no experience engaging a U.S. law firm, had no independent counsel, and knew nothing about professional conduct rules or lawyer-client privilege. He also argued that the company's requests in the litigation for information about his visa application triggered a confidentiality conflict. The Court denied the motion finding that (1) the business executive's "bare-bones, self-serving assertions" did not provide a basis to find that the waiver was unknowing or involuntary and that the firm would not have undertaken the representation without it, (2) that his immigration status was not confidential information and, even if it were, the company had possession of that information because they were involved in the visa application process in the first instance, and (3) that, in any event, the facts about his immigration status were not relevant to the underlying lawsuit. The court's ruling in the case demonstrates that a well-crafted and well-communicated waiver will be enforceable.

When the client is not a sophisticated businessperson, proficient in English, immigration lawyers must be especially careful to make sure the affected client is competent to make informed decisions concerning consent to dual representation. Competency may be ascertained by, among other things, the client's familiarity with legal matters in general, or with the legal matter at hand, the client's overall education and the presence of any language barriers.[124] In particular, as is always the case, when an immigration client's first language is not English, the lawyer must take steps to ensure that the client has a complete understanding of the terms of the written agreement to which she affixes her signature. This includes the use of a reputable translator, as well as the

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[122] See Wash. D.C. Ethics Op. 317 (November 2002) (addressing subject of revocable waivers of potential conflicts and whether withdrawal required, recommends that lawyer may not need to withdraw from representation of the other client if lawyer or client relied on the waiver to their detriment, and, in particular, if waiver agreement disclosed the consequences of revocation with respect to continued representation of one of the parties).

[123] See Letter Order, Radici v. ICF Mercantile, LLC., D.N.J., Civ-No. 2:14-cv-07133 (SRC) (CLW) (March 2, 2016) available at https://www.bloomberglaw.com/public/desktop/document/RADICI_v_ICF_MERCANTILE_LLC_et_al_Docket_No_214cv07133_DNJ_Nov_13?1457562202.

[124] See MR 1.14 which provides that a lawyer representing a client with diminished capacity, due to "minority, mental impairment or … other reason" should try to maintain a normal client lawyer relationship, but may take "reasonably necessary protective action" to insure proper representation. For a comprehensive discussion of MR 1.14 see EC MR 1.14 at pp 11-1.

lawyer's observation of cues exhibited by the client which conveys the client's level of understanding. Lawyers must always consider the client's ability to understand the nature of potential consequences of the dual representation, keeping in mind that many foreign nationals are more inclined to give their consent to any strategy that they believe advances their case.

In short, lawyers must communicate effectively that under dual representation there can be no secrets between the clients, but that the lawyer will maintain client confidences to outside parties.[125] Lawyers must also explain the difference between client confidences and lawyer-client privilege, to wit, that if there is litigation in the future between the clients, the privilege does not apply to joint communications.[126] Where the lawyer is seeking permission to continue to represent one of the clients, in the event where withdrawal from dual representation becomes necessary, there must be no doubt that the conflict is consentable in the first instance and that the consent is informed.[127]

Immigration lawyers contemplating a dual representation may benefit from noting at the outset of the representation "red flags" that should discourage the lawyer from undertaking the representations. Examples of red flags in family-based matters may include express requests to hide information about finances, previous relationships, or prior criminal behavior; or evidence of spousal or child abuse, all of which, when once revealed, may cause a negative change in the relationship during the course of the representation. In employment-based matters, red flags could include repeated questions from the employer about termination of the employee for cause, from the employee about how long he has to remain employed or whether the employer really has to pay the legal fees or the required salary to meet the prevailing wage requirement. Although this type of questioning is not dispositive of a problem, the lawyer must be a keen observer of any indication that the individual asking the question is doing so to further his or her own agenda. The client selection process in dual representation matter is not an exact science and to a certain extent, as a practical matter, may turn on the size and nature of the lawyer's immigration practice. But even when a lawyer is motivated to expand her client base, there may be instances in which avoiding problems with clients justifies erring on the side of caution, and just saying "no".

It bears repeating that an immigration lawyer may avoid potential conflicts of interest in family-and employment-based petitions by only representing one party. Ideally, the other party would obtain separate counsel. If the other party does not retain counsel and there is no dual representation, as addressed in MR 4.3, the lawyer should be careful not to provide the unrepresented party with legal advice or otherwise lead the unrepresented to believe that the lawyer is jointly representing parties.[128] Although MR 4.3 does not require that

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[125] See Comment 32 to MR 1.7 which provides in pertinent part:

> The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[126] See Comment 30 to MR 1.7 which provides in pertinent part:

> With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[127] See Wash. D.C. Ethics Op. 317, supra; Letter Order, Radici v. ICF Mercantile, LLC., D.N.J., Civ-No. 2:14-cv-07133 (SRC)(CLW)(March 2, 2016) available at https://www.bloomberglaw.com/public/desktop/document/RADICI_v_ICF_MERCANTILE_LLC_et_al_Docket_No_214cv07133_DNJ_Nov_13?1457562202, supra.

[128] See MR 4.3 (Dealing with Unrepresented Person) and Comments which are critical to understanding the rule properly. A comprehensive discussion of MR 4.3 is beyond the scope of this EC.

an unrepresented party confirm that she has been so advised, the prudent and conscientious lawyer should take steps to memorialize the unrepresented party's understanding not only to prevent confusion but also because the unrepresented party is more likely to understand the lawyer's disclosures concerning representation if they are put in writing. Further, as noted in Comment 32, any limitation on the scope of representation of a client—including that there is no dual representation—should be articulated in accordance with MR 1.2(c).[129]

The prudent and conscientious lawyer will still need to consider the practical difficulties that arise when only the petitioner is represented by counsel. As the immigration process gets more involved, for example in employment-based residency matters, from H-1B to labor certification to adjustment of status, it will likely become more and more untenable to represent the employer and not the employee.

Dual or "Joint" Representation in Immigration Matters

Interaction Among MR 1.7, MR 1.9, MR 1.6(a), MR 1.4(b), MR 1.18, and MR 1.16

An immigration lawyer who represents more than one client in the same matter must be mindful of potentially competing ethical obligations. Under MR 1.6(a), the lawyer owes the client the duty of confidentiality. Under MR 1.4(b), the lawyer is required to communicate with the client about matters relevant to the representation so that the client may make informed decisions about the representation. Under MR 1.9, the lawyer is prohibited from representing a current client in a matter that is the same or substantially related to a matter in which he represented the former client without the informed consent of both the current and former client. Under MR 1.16, the lawyer seeking to withdraw from representation must do so in a manner that does not prejudice the client.[130] Under MR 1.18, the lawyer owes a prospective client the same duty of confidentiality owed to a current or former client and the lawyer is subject to similar conflicts of interest prohibitions set forth in MR 1.7 and MR 1.9, though the protections for the prospective client are not as robust. In short, Rule 1.7 is designed to protect current clients, though it involves analysis of a number of factors, including a current client's relationship to former clients. Rule 1.7 provides the highest degree of protection with respect to conflicts. Rule 1.9 is designed to protect former clients. Less protection is provided in this rule as it is limited to the same or substantially related matters. Rule 1.18 is designed to protect prospective clients, but the lawyer had to have received information that could be "significantly harmful" to the prospective client. This is the lowest level of conflict protection among the three.

Each of the above-mentioned rules is premised on the lawyer's overall duty of loyalty to his client.[131] Dual representation may interfere with the lawyer's duty of loyalty, in particular, the lawyer's obligation to keep an individual client's confidences, to inform the client of all facts and circumstances necessary to make informed decisions about the representation and, of course, to avoid other conflicts.

Dual representation is common in immigration matters because at the initial stage of the representation, the clients' interests are usually aligned; the best interest of one is the same for the other. In that circumstance, the

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[129] See Comment 32 which provides as follows:

> When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[130] See Comment 33 to MR 1.7 which provides that "each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

[131] See, e.g., Strickland v. Washington, 466 U.S. 668, 692 (1984) (describing the duty of loyalty as "perhaps the most basic of counsel's duties"); Williams v. Reed, 29 F. Cas. 1386, 1390 (C.C.D. Me. 1824) (No. 17,733) ("An attorney is bound to disclose to his client every adverse retainer, and even every prior retainer, which may affect the discretion of the latter. . . .When a client employs an attorney, he has a right to presume . . . that he has no interest, which may betray his judgment, or endanger his fidelity."). ABA Canons of Prof'l Ethics Canon 6 (1908); Model Code of Prof'l Responsibility Canon 5 (1980) (DR 5-101; DR 5-105).

lawyer's duty of confidentiality to each client under MR 1.6 would not conflict with the lawyer's duty to disclose information to each client under MR 1.4(b).[132] When there are no secrets—because confidential information is shared, each client is able to make informed decisions about the lawyer's representation. In most cases, at that time, the lawyer is able to comply with his duty to act in each client's best interests.[133]

At a later point in the representation, the respective interests of each client may become sufficiently adverse to cause the immigration lawyer's representation of one client to be materially limited by his obligations to the other client.[134] Under MR 1.7, the immigration lawyer would have a prohibited conflict of interest between current clients (or a former client and current client under MR 1.9), which could only be resolved if each of the clients waives the conflict based upon informed consent. Absent that consent, the immigration lawyer may be forced to withdraw from representing both clients in accordance with the requirements of Rule 1.16(a).[135]

Conflicts similar to those arising with respect to current and former clients may arise even when a lawyer has not been formally retained. Conflicts pertaining to "prospective" clients are addressed in MR 1.18. At the very first contact with a prospective client in a matter that may involve dual representation, the immigration lawyer would need to advise the individual(s) that any confidential information communicated at the consultation would be shared along with any other information shared after the retention. However, there are instances under which providing such advice may be very difficult.

In some family-based matters, for example, the lawyer may consult with one spouse about the case strategy because the other spouse is outside the United States or when the foreign national spouse is detained, the lawyer may have to interview the clients separately regarding a marriage-based petition prior to formal retention. Further complications may arise if the same lawyer is consulted about representing the detained spouse in removal proceedings.

In some employment-based matters, the foreign national beneficiary (the employee or prospective employee) may first approach the lawyer, when the employer does not want to assume the burden of securing counsel. In those cases, the foreign national might disclose to the lawyer certain facts in confidence that any reasonable employer would want to know (e.g., that the foreign national has something in his or her background that could negatively impact a petition for immigration benefits or that the foreign national is being actively courted by other prospective employers). This would obviously present issues the lawyer would have to address in the event she were to later become the employer's counsel too.

As discussed, under MR 1.18, covering duties to prospective clients, conflicts involving a prospective client would be subject to the same conflicts analysis as former clients under MR 1.9.

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[132] ABA Formal Opinion 08-450 (April 9, 2008) (Rule 1.6(a) duty of confidentiality applies "separately and exclusively to each representation" in the same matter; conflict created by one client's request not to disclose confidential information to another client may be obvious at time of representation or at a later point where lawyer has duty under MR 1.4(b) to provide information to client to permit his making informed decisions about representation); Washington D.C. Bar Op. 296 (February 15, 2000) (concluding that mere fact of joint representation, without more, does not provide a basis for implied authorization to disclose one client's confidences to another; lawyer would need to withdraw from representing both parties, in the absence of a prior agreement to deal with the conflict).

[133] Comment 5 to Rule 1.4 states "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of the representation."

[134] See Comment 29-30 to Rule 1.7. In some cases, one party may simply want a lawyer to maintain confidentiality because disclosure might be embarrassing to the party or harmful to the relationship with the other party, such as when one relative may wish to keep secret from the other relative certain things, such as the facts surrounding a prior criminal conviction, which needs to be disclosed on an immigration form.

[135] In re Hull, 767 A.2d 197 (Del. 2001) (lawyer engaged in professional misconduct by failing to withdraw in a bankruptcy matter in which she represented husband and wife who separated and their interests became adverse).

Dual Representation and Conflicts of Interest in Family- Based Residency Matters

A dual representation conflict of interest may occur in marriage-based cases, such as where the petitioner is a U.S. citizen who wants her foreign-national spouse to obtain permanent residence. Although the foreign national spouses' interests are aligned with the petitioner in that they both want the foreign national to obtain permanent residency, during the course of the representation, the foreign national husband may tell the lawyer in confidence that he is involved with another woman and that as soon as he gets the green card he intends to obtain a divorce. Surely, the citizen wife would need to know that in order to decide if she wants to proceed with the petition on a dual representation basis or with separate representation, let alone stay in the marriage. If the lawyer has not already obtained a waiver of confidentiality at the inception of the representation that expressly contemplated this type of conflict, the lawyer would be faced with a current conflict of interest that would likely require the lawyer to withdraw from representation of both the husband and wife.

Another example might involve a marriage-based petition that has been successfully completed. After receiving her permanent residency, the wife may contact the immigration lawyer to seek his assistance in obtaining what she anticipates will be a hotly contested divorce. There the lawyer would be faced with a former-client client conflict subject to the criteria set forth in MR 1.9, and turn on the question of whether a divorce would be deemed a substantially related matter, which would then require the husband's informed consent.

An ethics opinion which addressed a conflict of interest in a common marriage-based residency matter is instructive.[136] The facts involved an I-130 petition that had been filed, after which the beneficiary wife contacted the lawyer to advise him that the petitioner husband was abusing her and she asked the lawyer to represent her in the filing of an I-360 (which does not require the husband's participation). Because it was not clear that the lawyer had obtained the couple's informed consent to joint representation, the bar committee analyzed the conflicts under three different scenarios: (1) where the husband and wife were deemed to be jointly represented current clients, (2) where the husband was deemed the only client or (3) where, if the I-130 process had been concluded, the husband were deemed a former client. The committee advised that, absent the informed consent of the husband and wife, the lawyer could not ethically represent the wife in filing the I-360 under any of the scenarios.[137] Even though the opinion suggested that theoretically that the husband might give his informed consent to the lawyer representing his wife in filing the I-360, as a practical matter it would be highly unlikely that the husband could agree to a course of action that was clearly against his own interests in having to concede that he had been abusive. The opinion acknowledged that if the representation had been structured in such a way that the lawyer was deemed to represent the wife only and it was clear that the husband understood that the lawyer's loyalties were to the wife alone, the lawyer would have no obligation to reveal confidential information to the husband.

As discussed in another ethics opinion, a dual representation conflict of interest may also occur in cases in which an immigration lawyer represents a foreign national child in removal proceedings as well as the proposed guardian in state family court proceedings.[138] While at the inception of the representation, the interests of the child

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[136] See New York State Bar Op. 761(2003) (in analyzing facts under New York's analogous code provision in effect at the time, bar committee reasoned that (1) if representation joint, current client conflict would involve duty of confidentiality to wife and duty of loyalty to husband, (2) if only the husband were client and I-130 still pending, same conflict if wife not separately represented, and (3) if the husband were a former client [as a result of the matter having been concluded], former client conflict of interest triggered since matters were substantially related).

[137] A similar conclusion was reached by the Rhode Island Ethics Advisory Panel in Opinion 2004-06 (October 27, 2004) in concluding that where an immigration lawyer had represented a husband and wife in marriage-based permanent residency matter and the husband petitioner withdrew the petition, under the former-client conflict rule, the lawyer was prohibited from representing wife in seeking permanent residency on the basis that she had been subjected to extreme cruelty by the husband. The committee found that the conflict could not be waivable if, as was the case, the wife refused to allow the lawyer to reveal confidential information about the extreme cruelty claim in seeking the husband's consent to the conflict.

[138] New York State Bar Opinion 1069 (August 19, 2015) (under analogous version of MR 1.7, committee concluded that despite potential for conflict, a lawyer who represents an immigrant child in federal administrative removal proceedings may

and the guardian may be aligned in that the ultimate goal is for the child to obtain legal status, there is a potential that the interests of the child and the guardian may become adverse. The state court may require an investigation of the guardian in the best interests of the child but the guardian may want to limit the investigation. Another potential conflict may involve the lawyer's duty to advise the guardian of her legal rights and obligations under circumstances where the child expresses concerns that the guardian may decide to withdraw the application based on the lawyer's advice. Lastly, the child may decide she wants someone other than the proposed guardian appointed. Notwithstanding the potential conflicts, and assuming the child has the capacity to make reasoned decision under Rule 1.14,[139] the opinion concluded that the lawyer could engage in dual representation in accordance with Rule 1.7.

As discussed in the ethics opinion above, conflicts of interest may arise where the interests of the parent or the guardian are not aligned with those of the child. In cases involving unaccompanied minor children, there are some lawyers who appear on behalf of an adult petitioner in state family court to obtain guardianship status and later will represent the child in the immigration proceeding. This is only feasible as long as there is no irreconcilable conflict of interest between the guardian and the child. The lawyer must pay heed to MR 1.7(b) to ensure, for example that she can provide competent and diligent representation when filing the appropriate petition on behalf of the child to obtain permanent residence as a Special Immigrant Juvenile after having represented the guardian in family court. Even if the guardian ceases to be the lawyer's client with respect to the immigration proceeding, MR 1.9 imposes duties toward the former guardian client. Of course, if there were separate lawyers representing the guardian in the family court proceeding and the child in the immigration proceeding, there would be no concern about conflicts of interest.[140]

Dual Representation and Conflicts in Employment-Based Residency Matters

Dual representation and conflicts of interest may occur in employment-based residency matters at the inception of the representation[141] or later from changes in the employer-employee relationship. The employer may tell the lawyer he is going to fire the employee. Here, the employee would need to have this information, especially if her immigration status is based on her employment. The lawyer would have a current client conflict of interest which could only be resolved by an informed waiver. If the employer refused to consent to waive confidentiality, the lawyer would likely have to withdraw from representing both clients with respect to the matter. If this type of conflict were presented in a waiver confirmed in writing by the employer and the employee, it might be possible for the lawyer to continue representation of the employer.

If the above employer did terminate the employee, another conflict could arise between the lawyer's obligation to assist the employer in the timely filing with USCIS of a "bona fide termination" (to avoid possibility of having to pay back wages and penalties), helping the employee in getting paid for return transportation home,

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simultaneously represent the proposed guardian in a state family court proceeding provided that the lawyer reasonably believes he can competently and diligently represent both clients simultaneously, and the lawyer obtains informed consent from each client, confirmed in writing).

[139] MR 1.14 addresses the circumstances under which a lawyer may properly represent a person with "diminished capacity." See generally EC for MR 1.14 dealing with representation of clients with diminished capacity.

[140] For an expanded overview of conflict of interest issues in representation of children in immigration matters, see AILA Practice Advisory, Ethical Issues Representing Children in Immigration Proceedings (January 2015) available at http://www.aila.org/practice/ethics/ethics-resources/2012-2015/ethical-issues-representing-children.

[141] A Los Angeles County Bar Association ethics opinion, Formal Opinion No. 465 (April 15, 1991) concluded that an immigration lawyer retained by a foreign national employee [permissible at that time] to obtain a permanent resident visa through a labor certification was required to obtain the informed consent of both the employee and employer to an existing conflict of interest, namely disclosure to the legacy INS that the employer has employed an undocumented foreign national in violation of INS law, providing for civil and potential criminal penalties.

or protecting the employee's opportunity to "port" to another employer prior to losing his H-1B status if USCIS revoked the petition on the basis of the termination.[142]

Other problematic conflicts may occur in dual representation scenarios when an employer advises the lawyer that he wants to keep confidential his financial records establishing ability to pay or proprietary records concerning responses to the required employment advertisement. Here although there is no statutory requirement that the employee obtain that information, in order to give his informed consent to dual representation, which otherwise should include a waiver of confidentiality, the employee would have to be advised of any limitations on disclosures imposed by the employer. As is always the case, informed consent would require that the lawyer explain the negative consequences of such limitations for the employee.[143]

As discussed in Hypotheticals Three through Five at pp 6-42 to 6-46, where the lawyer and the employer have had a previous and possibly long-standing relationship concerning a variety of immigration matters, the lawyer should consider informing the employee about that as well and make clear that the lawyer's representation of the employee is limited to obtaining an H-1B. In an effort to provide as much information about a potential conflict as possible, the lawyer could also disclose that certain matters, including discussions of possible layoffs or termination, may be kept confidential. The lawyer could consider advising the employee that if there were to be a termination, the employee would be notified in advance and advised to retain independent counsel in order to pursue other immigration options.

Similarly, if the immigration lawyer has been representing a high powered "star" employee, the lawyer may consider obtaining a waiver from the employer that the employee's future plans will not be discussed, and the lawyer will continue to represent the employee in other immigration matters even if the employee leaves in the future. Such waivers, while not as broad as those waiving all rights to confidentiality between the clients, may be a viable alternative.[144] Of course, one solution is to only undertake sole representation, but that too may present practical problems if the lawyer is heavily involved in advising both clients.

Dual Representation and Conflicts of Interest in EB-5 Matters

Caveat: We discuss EB-5 matters here only as they relate to conflict of interest issues for immigration lawyers. EB-5 matters involve other substantive areas of law, e.g., securities regulations. EB-5 representations implicate other professional responsibility rules with which immigration lawyers must also be familiar, for example, competence (MR 1.1), diligence (MR 1.3), fees, including fee sharing (MR 1.5), business transactions with clients (MR 1.8), trust accounts (MR 1.15), supervision (MR 5.1 and MR 5.3), (multi-jurisdictional practice and unauthorized practice of law (MR 5.5) and fraud (MR 8.4(c)), among others.

There is a potential for conflicts of interest for immigration lawyers who engage in dual representation in EB-5 matters, in particular, representation of regional centers and/or developers eager to obtain funding for a business project and foreign national investors eager to obtain the benefits of permanent residency through investment in such projects. As we have discussed, there is no per se prohibition against a lawyer representing multiple parties in the same transaction under MR 1.7, particularly in business transactions where the interests of the parties are essentially aligned. For that reason, a single immigration law firm or lawyer may consider representing the legal

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[142] See Amtel Group of Florida v. Yongmahapakorn, ARB CASE NO. 04-087, ALJ CASE NO. 2004-LCA-006 (September 29, 2006). In that case, the employer terminated the employment of an H-1B employee but never informed the USCIS. Subsequently, the employee filed a complaint with DOL seeking, among other things, back wages. The Administrative Review Board [ARB] held that a "bona fide" termination is effected for H-1B purposes only when the employer notifies USCIS of the termination. In cases where the employer terminates the employment relationship before the H-1B expires, either with or without cause, the employer must also offer transportation costs for the employee's return to his or her home country to effect a bona fide termination. The ARB awarded seventeen months of back pay for the period between the termination of the employment and the expiration of the H-1B since the termination had not been bona fide.

[143] See comment 31, MR 1.7. See generally Austin T. Fragomen Jr. & Nadia H. Yakoob, "No Easy Way Out: The Ethical Dilemmas of Dual Representation," 21 Geo. Immigr. L. J. 621 (2007).

[144] See Comment 28, MR 1.7.

interests of EB-5 investors and regional centers or developers ["regional center'] in the service of guiding the legal strategy for an entire project. The advantages of this arrangement include USCIS's ease of communication with only one entity during the various phases of the project and the financial benefits to the law firm or lawyer in performing all of the legal work. Third-parties, e.g., sometimes referred to as agents, may also find it easier to interact with the regional center and investor when there is only one law firm or lawyer handling the matter. At the inception of an EB-5 matter, the alignment of all of the parties is generally clear and multiple representation may seem highly appropriate.

However, as most immigration lawyers who handle EB-5 matters have learned, there are a number of potential conflicts for the lawyer's clients that may not be initially foreseeable and, if such conflicts are not waived, may require the lawyer to withdraw or cause other consequences. For example, a conflict may arise between the lawyer's duty of confidentiality to the regional center and duty of loyalty to the investor if the lawyer comes to learn of problems for the project as it goes forward, e.g., zoning, environmental issues, community opposition or construction snags—that may cause delay or undermine the viability of the project altogether. Under such circumstances, there is also a considerable risk that the lawyer's personal interest in maintaining a positive relationship with the regional center (generally the greater source of income) will create a conflict. Lastly, in cases where a nonlawyer third-party is involved as an "agent," there may be ethical issues implicated if the agent offers a referral fee to the lawyer or collects a "referral" fee from the regional center. As a way of avoiding even the appearance of a conflict, an immigration lawyer may consider limiting representation to only the regional center or the investor.

Given the high economic stakes involved, even a lawyer or firm that attempts to represent only one party in the EB-5 project may be subject to a conflict of interest claim if the EB-5 project fails, leaving the investors empty-handed and without a basis for permanent residency. In similar circumstances, a group of EB-5 investors brought a shareholder derivative suit against the regional center in a federal district court.[145] They alleged bad business practices and sought compensation for loss of their investment funds. Counsel for the plaintiff investors was disqualified on the basis of a former client conflict because a lawyer who worked for the plaintiff's firm had provided some legal services to the regional center at the early stages of the project. Although there had been no formal retention agreement between the regional center and the lawyer, the court found there was a lawyer-client relationship that created a conflict of interest that had not been waived. On the basis of the irrebuttable presumption that the lawyer in question shared the regional center's confidences with other of the plaintiff's firm's lawyers, the firm was disqualified.

Immigration lawyers who decide to engage in EB-5 multiple-representation of the regional center and the investor should prepare detailed conflict of interest waiver agreements. Those agreements must disclose the needed information to allow regional centers and foreign investors to provide the "informed consent" to the conflict *and* provide support for the conclusion that the lawyer's belief that she can provide diligent and competent representation to multiple parties to the transaction is "reasonable." [146] [147]

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[145] See Terence K. Sumpter, et al. v. William B. Hungerford, Jr. et al., Case number 2:12-cv-00717 (E.D.L.A. 2012) (Dkt. No. 149) (EB-5 investors sought compensation for poor return on EB-5 investments in failed regional center project on the basis of bad business practices; plaintiffs' lawyers disqualified on the basis that there was sufficient evidence, even without a written engagement letter, for the defendant regional center to have reasonably believed that the plaintiff's lawyer was acting as counsel for them).

[146] See Austin Fragomen and Chad Ellsworth, The Dangers of Dual Representation (October 2016) at http://www.eb5investors.com/magazine/article/dangers-dual-representation.

[147] As reflected in a December 7, 2015 SEC press release, the SEC took action against a number of immigration lawyers involved in EB-5 matters, the majority of whom entered into settlement agreements in response to charges that they had offered EB-5 investments to clients and received commissions while not registered to act as brokers. Only one immigration lawyer was charged with fraud; the others who did not admit liability cooperated with the SEC in entering into cease and desist agreements. See SEC Press Release 2015-274 available at https://www.sec.gov/news/pressrelease/2015-274.html.

In addition to conflicts created by the lawyer's general competing duties of confidentiality and loyalty discussed above, a conflict may be raised in EB-5 matters if the lawyer accepts referral or commission fees from regional centers or agents without disclosure and under scenarios which do not comply with MR 5.4 concerning sharing of fees with non-lawyers. This may occur if a lawyer pays a foreign migration agent (FMA) a fee when the FMA refers the client to a lawyer, and where the fees are for ensuring that the FMA "takes care" of the client regarding evaluation of the source of funds or with translations. The lawyer will have to consider whether the arrangement amounts to impermissible fee sharing (under MR 1.5) or may be permitted on the basis that the lawyer is paying the FMA for actual services to the client for a fixed fee, that is commensurate with the services performed.

A recent New York State Bar Association ethics opinion expressly addressed potential conflicts of interest triggered by an immigration lawyer's financial relationship with an FMA who hires the lawyer on behalf of the client and assists the lawyer in communicating with the client as well as other services such as gathering and translating necessary documents.[148] The opinion identified the potential conflict between the lawyer's interest in receiving continuing referrals from the FMA and the FMA's economic interest in the client's investing in a particular regional center. The lawyer's judgment on behalf of the client might be affected, for example, if the lawyer believed that the particular investment was not in the client's best interests. The opinion also identified other ethical concerns, among them, impermissible fee sharing with a nonlawyer. The opinion concluded that a lawyer may be permitted to enter into the arrangement with the FMA described above if the lawyer complies with the following conditions:

> (1) the relationship between the lawyer and the nonlawyer is not exclusive, (2) the nonlawyer does not interfere with the lawyer-client relationship, (3) the client consents to the potential conflict of interest resulting from the referral relationship between the lawyer and the foreign migration agent, and (4) the lawyer is not paying the foreign migration agent for referrals. The lawyer must bill the client separately for fees and expenses and must inform the client of the name and amount charged by the foreign migration agent for nonlegal services.

Acceptance of referral fees or commissions may also trigger violations of SEC regulations. A lawyer who is properly registered as a broker and also represents the investor may have a conflict under SEC rules.[149]

[148] See New York State Bar Association Ethics Opinion 1116 (March 29, 2017).

[149] However, in the context of real estate transaction, a bar committee concluded that a lawyer who acts as a broker for a fixed fee that is not contingent on the closing of the transaction could also ethically represent the seller upon informed consent and compliance with other applicable rules. See NYSBA Ethics Op. 1015 (August 4, 2014).

D. Hypotheticals

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice. We remind lawyers to always check the applicable state version of MR 1.7, the accompanying Comments and any related rules discussed below, in particular MR 1.9.[150]

Hypothetical One: Removal of Conditions

Anna has previously received a green card based on her marriage to Sally, who also had signed the required Affidavit of Support. The matter initially was handled by another immigration lawyer. Anna and Sally ask Bob to represent them in the filing of an I-751 petition to remove conditions. Bob presents Anna and Sally with an engagement agreement which states that Bob will be representing the two of them simultaneously and as a result, all information provided by one of them will be shared with the other. The agreement also states that "there are potential conflicts of interest connected to the representation." Anna and Sally sign the agreement. At the time of signing, Anna and Sally are getting along well. Shortly after Bob files the I-751, Anna, the foreign national, informs Bob that Sally found out that Anna was having an affair and has moved out of their apartment. Anna does not expect that she will reconcile with Sally, and tells Bob that their marriage is over. Indeed, Anna and Sally are not on speaking terms. Anna says that in order to protect her financial interests, some of which are not known to Sally, she has retained a divorce lawyer. She tells Bob that she does not want Sally to know that Anna has retained divorce counsel or that she has concealed certain financial interests from Sally. Anna tells Bob that she is very worried because the last thing Sally said when she walked out was that she was going to withdraw the I-751 because Anna cheated on her.

Analysis

This scenario presents multiple problems for Bob in light of the fact that Anna and Sally appear to have conflicting interests in the immigration matter, and most certainly with respect to the potential divorce. These conflicting interests implicate Bob's ability to continue representing Anna and Sally in the I-751 matter.

Best practice for Bob when first confronted with this potential conflict:

As a practical matter, Bob should get Anna's permission to contact Sally to discuss the status of the relationship and the possibility of continuing the pending I-751.

The conflict analysis for Anna and Sally's matter will necessarily involve the answers to the following questions:

Who is the client?

Per the engagement agreement, which essentially provides for dual representation, both Sally and Anna are clients.

Is there is potential or actual conflict?

Based on the information provided by Anna, there would appear to be an actual conflict between current clients which is covered by the provisions of MR 1.7(a). As contemplated at the outset of Bob's representation, Sally was willing to cooperate with Anna's request for removal of conditions based on the bona fides of their marriage and the fact that they still were married and living in the same household. Their interests were aligned. Now, according to what Anna has told Bob, the marriage is over and Sally is going to seek to withdraw the petition. The conflicts at issue concern whether Bob may continue to represent Anna in seeking to remove the conditions should Sally ask Bob to withdraw the petition. Because Bob is representing both Anna and Sally his

[150] For example, California's conflict of interest Rule 3-310(c)(1) prohibits a lawyer from accepting representation of joint clients in which the "interests of the clients potentially conflict" without the written informed consent of each client. At present, California has not adopted the Model Rules, but it is anticipated that it may do so in the near future. See State Summary of State Variations at 6-52.

duty of loyalty to Anna is in conflict with his duty of loyalty to Sally.

Bob also has a confidentiality conflict because Anna has asked Bob not to disclose to Sally that she has retained a divorce lawyer and that Anna may have concealed certain financial interests.

Given that there is a conflict, is it consentable (or waivable) by the affected parties?

At least with respect to the filing of the I-751 petition for Anna, the conflict is waivable under MR 1.7(a) and MR 1.7(d). If Anna obtains a good faith waiver after they divorce and is approved for unconditional permanent residence, there is no direct adverse legal consequence to Sally. A derivative consequence could be that she would be obligated to comply with the Affidavit of Support, but that would be the case whether or not they stay married. There is no evidence in the hypothetical that supports the conclusion that the marriage was not bona fide. Accordingly, there is a good argument that this is not a concurrent conflict under MR 1.7(a)(1). However, it is clear that Bob has a conflict under MR 1.7(a)(2) in that representation of either Sally in withdrawing the petition or Anna in seeking the waiver to proceed with the I-751 without Sally's cooperation "presents a substantial risk" that Bob's representation of either one would be "materially limited" by Bob's duties to the other as a concurrent client or even as a former client. Absent a waiver, he would have to withdraw from representing either. Because both Sally and Anna would then become "former" clients, Bob would be prohibited from representing either under Rule 1.9 (former client conflict) without a waiver.

In order to reduce the risk of having to withdraw from the representation if a conflict occurred, Bob should have obtained advance consent to this type of conflict in the retainer agreement using language that would have spelled out the nature of all contemplated conflicts and how they would be handled, as set forth in Comment 22 to MR 1.7. Such a provision might have obviated the need for a subsequent waiver.

An argument could be made – albeit a weak one – that Anna and Sally granted a waiver of this conflict when they signed the engagement letter which stated that "there are potential conflicts of interest connected to the representation." As discussed below, this phrase in the agreement would not likely be deemed sufficient to bind either Anna or Sally, since it does not provide sufficient information about the kind of conflicts that might occur and did not explain the consequences of continued representation of one or the other. Simply put, it would be very difficult to infer that the language in the agreement amounted to "informed consent" waiving this conflict.

It is worth noting that if Anna's application is approved, Sally will still be obligated under the terms of the Affidavit of Support filed with the original petition. Any issues concerning the enforceability of the Affidavit would need to be resolved in civil court, where Anna and Sally's interests would be directly adverse. If Anna or Sally asked Bob to represent either one in the civil action, Bob would be subject to the former client conflict rule under MR 1.9, since a dispute over the Affidavit of Support would be substantially related to the I-751. This would be a waivable conflict if Bob has a reasonable belief that he could provide competent and diligent representation to Anna or Sally as required under MR 1.7(b)(1).

Assuming Bob obtains the consent of either Anna or Sally, what else must he do to ensure that the consent is enforceable under MR 1.7(d), i.e., informed consent and confirmed in writing?

As reflected in the text, both the phrases "informed consent" and "confirmed in writing" are defined. Here, what may be referred to as the "open-ended" language in the original dual representation engagement agreement lacks sufficient information about the nature of the conflicts and consequences of any waiver to be deemed informed. The language is not only ambiguous as to the nature of the conflicts, it also fails to explain how the representation would be affected by the conflict. Moreover, because there is no specific language in the agreement stating that Anna and Sally waive any objection to further representation of either should a conflict arise, it would be hard to argue that the signing of the agreement amounts to written confirmation of any consent. In this case, an email to both parties clearly explaining the nature of the conflict and the consequences of the waiver would suffice. The prudent and cautious lawyer would ask that each client review the written confirmation and show their agreement by either signing a writing, or in this case, responding to his email and typing "I agree."

Conclusion

Without Anna's and Sally's consent to disclose confidential information, Bob would have to withdraw from representing Sally and Anna in the current matter or in any matter related to Anna's immigration status. Bob would have to comply with MR 1.16, entitled "Declining or Terminating Representation."[151] Specifically, MR 1.16(c) would require "compliance with applicable law requiring notice to or permission of a tribunal when terminating a representation" and MR 1.16(d) would require that Bob take "steps to the extent reasonably practicable to protect [his] client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled [to the extent permitted by other law] and refunding any advance payment of fee or expense that [had] not been earned or incurred." Under MR 1.9, Bob could only represent Anna (or Sally in the alternative) in the same or a substantially related matter if both Sally and Anna provided informed consent in writing.

Hypothetical Two: U-Visas and Derivatives

Adrienne, an undocumented foreign national living in Delaware, was robbed at gunpoint while walking home from the movies; this incident caused her tremendous suffering. She immediately called the police to report the crime, which ultimately led to the robber's arrest and conviction. Adrienne hires Grover, an immigration lawyer, to assist her with filing a petition for U status as a crime victim. Grover carefully explains to Adrienne that USCIS can only grant U status to 10,000 principals per year and that the wait for U status will likely be many years. Grover prepares an engagement letter for Adrienne and both lawyer and client sign it. The engagement letter says that Grover represents Adrienne only. As only one client is listed on the engagement letter, Grover does not mention conflicts of interest or address any related issues. Grover promptly prepares and files the U petition for Adrienne. Adrienne drops by Grover's office a month later, and she mentions how sad she is that her husband, Dave, cannot also benefit from this process. Grover explains that her husband can apply as a derivative to obtain U-2 status and Adrienne is delighted to hear the good news. Grover says that all she must do is pay an additional legal fee, and he will prepare and file the proper forms and submit them. Grover is hired and promptly files Dave's case. Two years later, both Adrienne and Dave receive letters stating that the service center has reviewed their cases and would approve them, if only one of the 10,000 spots were available. Both Adrienne and Dave receive Deferred Action and shortly thereafter they receive work authorization, which can be renewed as long as their Deferred Action continues. Six months after they receive work authorization, Adrienne calls Grover and says she wants to get divorced from Dave.

Analysis

The conflict analysis for this hypothetical will necessarily involve the answers to the following questions:

Who is the client?

Here, both Adrienne and Dave are clients. Notwithstanding the language in the engagement letter signed by both Grover (lawyer) and Adrienne (client), Dave became a client when Grover agreed to represent him and accepted a fee for the services.

Is there a potential or actual conflict?

There is an actual conflict here because Adrienne now wants to divorce Dave. Adrienne and Dave will be waiting for a long time of unknown duration for a spot to become available so that the U petitions can be approved. If Adrienne and Dave divorce before the petitions are granted, then Dave will lose his opportunity to get U status. Under 1.7(a)(2), Grover's ability to represent Dave effectively is materially limited by his obligations to Adrienne. She has stated that she wants to get a divorce. It would be in Dave's best interest to try to reconcile with Adrienne or at least convince her not to pursue the divorce until Dave has had his U status for three years and ultimately adjusts status to permanent residence.

Is the conflict consentable?

[151] Lawyers are referred to EC for MR 1.16 for comprehensive discussion.

Here, Grover did not include Dave in the original engagement agreement. A prudent lawyer would have drafted an addendum to the original engagement letter recognizing Dave as a client, explaining that there are potential conflicts of interests between the two clients, and explaining how privilege and confidentiality are affected by this dual representation.

Who are the clients?

Here, although Adrienne initially retained Grover to represent only her in obtaining the U status, once Grover agreed to file papers to assist Dave in obtaining legal status derivatively, Dave then became Grover's client as well. The fact that Adrienne paid the fee is not relevant to the question of whether a lawyer-client relationship between Grover and Dave has been formed; nor does the third-party payment affect the duties Grover owes to Dave.[152] As a matter of best practice, once Grover agreed to represent Dave, he should have drafted an addendum to the original engagement agreement providing and explaining that there are potential conflicts of interests between the two clients, and how privilege and confidentiality will be affected by this dual representation. In particular, Grover should have obtained a waiver of confidentiality and a waiver of potential conflicts that included those created by marital discord. Here it is clear that Grover did not do so.

Is there a conflict?

Once Grover determines that Adrienne and Dave are his clients, he must determine *if there is a concurrent client conflict.* Here Adrienne's interest in divorcing Dave is directly adverse to Dave's interest in obtaining legal status on the basis of the marriage. Circumstances indicate that the couple will be waiting for a long time of unknown duration. Once Adrienne's U visa is granted, Dave would have to wait three years to adjust his status. Given the impending divorce, it would be in the husband's best interests to reconcile with the wife or convince her to postpone action on the divorce until he was able to adjust status to permanent residence. Under 1.7(a)(2), Grover's ability to represent Dave effectively would be materially limited by his obligations to Adrienne, starting with the duty of confidentiality. Dave would need to know that the marriage was in jeopardy, because a premature divorce would bar his ability to obtain U status. Without that information, Dave would lose the opportunity to try to save the marriage or consider alternate roads to legal status.

Is the conflict consentable?

There is no per se bar to obtaining the affected parties' consent to the conflict presented here because consent is not prohibited by law (MR 1.7(b)(2)) and the immigration matter does not involve a litigated dispute between the husband and wife (MR 1.7(c)) that is before a tribunal. However, because Adrienne did not express permission to share confidential information with Dave, Grover will need to obtain Adrienne's permission to tell the husband about the divorce. Without that permission, Grover would have an irreconcilable concurrent conflict under MR 1.7. In order to ensure that any waiver of confidentiality is informed, Grover would need to discuss the consequences of not sharing the information, in particular, that he would have to withdraw from the representation in its entirety. He also would have to explain that under MR 1.9, he could not subsequently represent Adrienne in the U petition matter because he still had a duty of loyalty to Dave as a former client. That duty would prevent him from representing Adrienne in a matter that was the same or substantially related to the U status matter. Here, as a practical matter, Dave would more likely consent to Grover's representation of Adrienne in the U petition matter, if he were advised upfront about the divorce and given a chance to save the marriage or persuade Adrienne to delay action on the divorce to help him obtain legal status.

Is the consent informed and confirmed in writing?

Whether Grover obtained the wife's consent to share confidential information or Dave's consent to represent Adrienne in her U petition matter, the consent would have to *be informed and confirmed in writing.*

[152] MR 5.4(c) expressly provides that a "lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

Conclusion

Without Adrienne's consent, Grover would be prevented from disclosing information about the divorce to Dave. Grover would have to withdraw from the representation in compliance with MR 1.16(d), which requires the lawyer to take reasonably practical steps to protect the interest of both Adrienne and Dave, such as providing adequate notice, allowing time to retain new counsel and returning relevant papers.[153] Upon withdrawing, Grover would be prohibited from subsequently representing Adrienne in the U Petition matter without Dave's consent because Grover still owes him the duty of loyalty. As discussed above, as soon as Grover agreed to represent both the husband and the wife, he should have obtained a waiver of confidentiality and potential conflicts.

Hypothetical Three: Employment-Based Permanent Residency Matter

Mary, an immigration lawyer, was asked by Joe's Computer Co., [the Company or Joe] to assist in securing lawful permanent resident status for its H-1B employee, Charles. Mary has previously handled similar applications for the Company and agreed to prepare and submit the "PERM" labor certification application, followed by the I-140 petition for alien worker and I-485 application to adjust status. The Company is required to pay the lawyer's fees and other costs for the labor certification application, but Joe and Charles agreed that the Company would also pay Charles's legal expenses for adjustment of status. Both Joe and Charles indicated they expect that Mary would be available to answer their respective questions and pursue the Labor Certification process in their mutual interest. Both sign the engagement agreement which is silent as to how confidential information will be treated vis-a-vis each other. In particular, the agreement makes no reference to the confidentiality of the Company's tax returns and audited financial statements, notwithstanding that Joe has previously advised Mary that such documents must remain confidential.

With respect to conflicts of interest, the engagement agreement provides as follows:

In the event of any irresolvable conflict between Joe, the employer, and Charles, the employee, that requires Mary, the lawyer, to withdraw from the representation, Charles agrees that, at Mary's option, she may continue to represent Joe in connection with any pending or future immigration-related cases unrelated to Charles's immigration matter.

While Mary is in the process of preparing the labor application, which includes the expensive labor market test, Charles tells Mary that he has heard rumors that the Company is having financial problems and he is worried that the Company may not be able to establish, as required, that it has the ability to pay the prevailing wage. In particular, Charles has heard from a reliable source that the Company is going to lose one of its largest customers. He asks Mary for copies of the Company's relevant tax returns and audited financial statements, which he correctly assumes are in Mary's possession because of her prior legal services to the Company. Charles also tells Mary that he plans to leave the Company, as soon he becomes "portable" (after the relevant I-140 petition has been approved and the Employee's I-485 application has been pending for 180 days), and he may even leave immediately after the relevant I-140 petition is approved (the approval of that petition would effectively "freeze" Charles's priority date and may also help him continue his H-1B status beyond the six-year limit). Charles tells Mary to keep that information confidential for fear that Joe might take steps to fire him, withdraw the I-140 petition or take other action adverse to Charles.

Analysis

This scenario presents Mary with a conflict about the confidentiality of the information that Charles has provided as well as with his demand for access to information that also appears to be confidential to the Company. Mary is in a classic dual representation bind that her engagement agreement does not address in a satisfactory manner. Moreover, there may be a question as to whether Charles was provided with sufficient information to render his consent to Mary's continued professional relationship with the Company should she have to withdraw from the representation.

[153] See discussion of interaction of MR 1.16, and other rules, with MR 1.7 at pp. 6-31, herein.

The conflict analysis for this hypothetical will necessarily involve the answers to the following questions:

Who is the client?

Although Mary did not expressly use the phrases "co-clients", "joint clients" or "dual representation" in the engagement agreement, Joe and Charles should be deemed joint clients to whom Mary owes a respective duty of loyalty and any other duties imposed under the model rules. Joe and Charles signed the engagement agreement, which implies that the representation is joint insofar as the agreement mentions that there is a potential for a conflict. No conflict would arise if both Joe and Charles were not clients. Notably, the fact that Joe is paying the legal fees for Charles's adjustment of status is not determinative one way or the other. The key factor is that both Joe and Charles have a reasonable expectation at the outset of the representation that Mary will be representing both of them given that their interests are aligned.

Is there a potential or actual conflict?

Joe and Charles's interests are aligned at the inception of the matter and there is no known actual conflict. Both Joe and Charles share the same goal and the process as a practical matter involves a degree of cooperation. However, in order to avoid a future conflict between the lawyer's duty of loyalty to one client and duty of confidentiality to the other, clients would normally need to be advised that in the joint representation scenario information imparted by one client will be shared with the other. Here, there was no such express provision in the engagement agreement. As to confidentiality, the engagement agreement is ambiguous at best. There is clearly a potential conflict.

The potential for a conflict becomes an actual conflict when Charles asks Mary for access to otherwise confidential financial documents and tells Mary about his plan to leave the company, taking advantage of "portability." On the one hand, Mary has a duty to respect Joe's instruction to keep the Company's tax returns and financial statements confidential. On the other hand, she has a competing duty to provide Charles with information that goes to the viability of the labor certification process in the first instance. She also has a duty to advise Joe that Charles plans to use the "portability" benefit to his sole advantage, leaving the Company without its desired employee. Mary may also have a duty to advise Joe that the Company is rumored to be losing an important client since, as Charles believes, loss of an important client may be relevant to the Company's ability to pay the prevailing wage. Absent some kind of waiver, Mary would have to withdraw from the representation of both clients under MR 1.7. She cannot serve two masters who want to keep secret from one another critical information that Mary would otherwise have a clear duty to disclose. If Mary's only recourse were to withdraw, as discussed above [and below], she would have to comply with the requirements of MR 1.16(d).

Given that there are conflicts, are they subject to consent (also referred to as "waivable")?

The conflict at issue here is a concurrent conflict as described in MR 1.7(a)(2). Clearly there is a substantial risk that Mary's ability to provide diligent and competent representation to both Charles and Joe would be materially limited by her competing duties to them individually. An argument could be made, albeit not a strong one, that Charles and Joe have already waived confidentiality ("advance waiver") when they agreed that if a conflict of interest occurred, Mary could simply withdraw and continue to represent Joe in unrelated matters. But, as we discuss below, the agreement's reference to an "irresolvable conflict," without specific details, would not establish that Charles understood the nature of any conflicts that might occur or the negative consequences of any waiver. In particular, he was not advised about how confidential information would be handled. That is evidenced by the fact that he is asking for documents that Joe has deemed confidential, while at the same time, directing Mary to withhold confidential information from Joe. Here, in order for Mary to continue representing Joe and Charles, Mary would have to obtain mutual waivers of confidentiality from Joe and Charles, including consent from Joe to provide the financial documents and consent from Charles to disclose the negative information about the company and his plans to leave the Company once he obtained the benefit conferred by Joe's efforts in the Labor Certification matter. Clearly, that's not realistic.

If so, is the consent informed and confirmed in writing?

As discussed, because the engagement agreement is silent as to how confidential information is to be handled, it would be hard to establish that there was even implied consent. The waiver must be "informed" and confirmed in writing. Mary would have had to explain to both Charles and the Company the advantages and disadvantages of a waiver and the practical and legal consequences to each should she have to withdraw if consent were withdrawn or if another irreconcilable conflict arose.

Conclusion

Although it appears that Mary was trying in good faith to rule out ethical problems by referencing potential conflicts in the engagement agreement, she overlooked the most fundamental principle of dual or joint representation—waiver of confidentiality between the affected parties. Without a waiver as to confidentiality, it would be impossible for Mary to provide competent and diligent representation to either client. Further, because Mary was already aware that Joe had previously advised her that his financial records must be kept confidential, she had a further reason to include a confidentiality waiver, with a possible cut out as to financial records.[154] Further as discussed above, generally when a lawyer has had a previous, and perhaps also a long-standing, relationship with the employer, the lawyer would be wise to disclose that relationship to the employee and where applicable, that the employer may request that the lawyer keep strategic or propriety information confidential. Without Joe's informed consent, she cannot provide the financial statements to Charles. Without Charles's informed consent, she cannot disclose to Joe that Charles has plans to terminate the employment once he obtains the benefit of Joe's sponsorship. Mary therefore would have to withdraw from the representation, subject to the requirements of MR 1.16 discussed in Hypothetical One above. However, even without Charles's permission, Mary would probably be able to continue to represent the Company in unrelated immigration matters.

Hypothetical Four: Employment-Based Permanent Residency (Variation of Hypothetical Three)

The fact pattern is the same as above **except** that the jointly signed engagement agreement provides different language concerning confidentiality and conflict of interest waivers as follows:

Confidential information imparted to Mary by either the Company or Charles will not be shared with the other. Potential conflicts of interest between the Company and Charles may arise which may require Mary to withdraw from the representation of the joint clients in this matter if (1) either Charles or the Company files a legal action against the other or (2) either Charles or the Company advises Mary that either shall be terminating the employer-employee relationship.

The fact pattern also differs as follows:

After the labor certification is secured, and while Mary is preparing the Form I-140 petition package, Joe tells Mary that the company is planning a sizable layoff because of an unexpected downturn in business. He tells Mary that there is a good chance that Charles will be included in the group being laid-off. Joe asks Mary about (1) the immigration law-related consequences to the Company and to Charles, if Charles is laid off; and (2) if it still makes sense to submit the I-140 petition package to USCIS as originally planned. Joe also asks Mary whether she would be able to assist the Company in withdrawing Charles's H-1B and I-140 petitions after the I-140 package is filed.

Analysis

The conflict analysis for this hypothetical will necessarily involve the answers to the following questions:

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[154] See Comment 31 to MR 1.7 which provides in pertinent part as follows:

In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

Who is the client?

Following the same analysis as the original scenario, Joe and Charles are joint clients.

Is there potential or actual conflict?

Both. By confirming MR 1.6's requirement that a lawyer may not disclose confidential information without the affected client's informed consent, the agreement arguably signals the potential conflict that will arise when Mary learns, on the basis of information provided by either client, that the interests of the Company and Charles are no longer aligned. Although the agreement provides notice of two scenarios that may require Mary to withdraw, the mere identification of potential conflict scenarios without more may not be enough to be deemed an advance waiver to any actual conflict that arises.

Here, an actual conflict arose as well when Joe told Mary about the anticipated lay-off and the "good chance" that Charles's employment might be terminated before the I-140 is approved. Mary cannot provide Charles with competent and diligent representation without sharing this information with him. In order to do so, she would have to obtain Joe's consent. Joe's request that Mary represent him alone also creates a conflict.

Is conflict consentable?

Before determining whether the potential conflicts articulated by Mary are consentable under MR 1.7, we must analyze the question of whether Mary's use of the phrase "confidential information" without any further explanation is adequate to apprise Charles or the Company about potential or actual conflicts in the first instance. A lawyer should not assume that the signatories to an engagement agreement understand the use of terms or phrases that are essentially terms of art. Here, as broadly defined by MR 1.6, confidential information is "information relating to the representation." Best practice would be for Mary to use that language in the waiver agreement or at least define the term.

(1) Two Potential Conflicts:

Mary is correct that a conflict of interest would arise if either Charles or the Company filed a legal action against the other. However, the language used is ambiguous because it is possible that Charles and the Company could retain other lawyers to represent them in a dispute that is unrelated to the immigration matter. If so, there would be no per se prohibition against Mary continuing to represent them in the immigration matter. This is a classic case of sloppy language.

However, Mary could not represent either Charles or the Company against the other under MR 1.7(a)(2) (current client conflict) or MR 1.9 (former client conflict), if the matter at issue was the same or substantially related to the immigration matter. Although either conflict could theoretically be waived at the time it occurred.

Mary is also correct that a conflict could arise if either Charles or the Company advised Mary that either intended to terminate the employment. The duty to provide competent and diligent representation to either client would require Mary to disclose that information to the other party, which she could not do without the permission of the affected parties. As written, the engagement agreement expressly prohibits such disclosures, as MR 1.6 would anyway, without a waiver. Putting aside the confidentiality issues, a conflict might also arise as a result of a termination, if Mary were asked to continue to represent one of the affected parties in the same immigration matter. Although the interests of Charles and the Company might not be directly adverse, Mary's representation of one surely would be materially (and most likely fatally) limited by her duty of loyalty to the other client.

(2) Actual Conflict:

Once Joe told Mary about the contemplated layoff and the "good chance" that Charles may be included in the layoff, Mary had an actual conflict. Absent the Company's consent, she would not be able to tell Charles that he has a good chance of being laid-off and losing H-1B status—if the layoff occurred while the H-1B and I-140 petitions were pending. Further, Mary would be conflicted from providing legal advice to the Company about the pros and cons of going ahead with the petitions. While normally providing general information about the consequences of termination would not create a conflict, it is clear here that Joe was asking for legal advice

expressly related to the likely termination, and further asking that Mary continue to represent him in the same matter, if Mary has to withdraw because of the conflict.

Mary could try to obtain Joe's consent to disclose the information about the layoff and reach agreement with Charles as to whether she could continue to represent the Company in withdrawing the relevant petitions. As a practical matter, much would depend on the good will between Joe and Charles.

Conclusion

As in the original fact pattern, Mary has not drafted a proper engagement agreement for dual representation, notwithstanding her attempt this time to provide notice to the affected parties of potential conflicts and provide for the option to continue representing the Company in future immigration cases if she had to withdraw. Here, Charles and the Company should have been advised about the pros and cons of dual representation, including the practical necessity of waiving confidentiality, discussion of the common types of conflicts that could arise in their employment-based matter and what procedures would be followed if Mary's withdrawal from the representation were required. Further, as discussed above, generally when a lawyer has had a previous, and perhaps also a long-standing, relationship with the employer, the lawyer would be wise to disclose that relationship to the employee and where applicable, that the employer may request that the lawyer keep strategic or proprietary information confidential. Without those disclosures and the resulting "informed consent," Mary would have difficulty enforcing the agreement. If Joe and Charles could not agree to waive confidentiality at the outset, Mary would be wise to recommend that Charles engage separate counsel.

Hypothetical Five: Employment-Based Permanent Residency (Variation of Hypothetical Three)

The fact pattern is the same as above except that the jointly signed agreement provides different language concerning confidentiality and conflict of interest waivers as follows:

The parties agree that their respective confidential information may be shared among the Company, Charles, and the lawyer, with the exception of the Company's financial documents. Furthermore, the parties understand that there is no attorney-client privilege between the parties. The parties agree that the lawyer will not share financial documents with Charles (e.g., tax returns, audited or unaudited financial statements, etc.) even though copies of these documents may be filed with USCIS. Conflicts of interest in these kinds of cases are rare, but there is always a risk of a conflict of interest in any case where two or more clients are represented by the same lawyer on the same case. The advantage of this dual representation is that it allows the parties to save time and resources. It is not possible to list all the circumstances in which a conflict might arise; however, some examples are listed here: (1) The employee client revokes his permission to share confidential information and tells the lawyer that he plans to quit his job shortly after becoming a permanent resident. (2) The Company client tells the lawyer that the Company is having financial trouble, calling into question whether it can prove its ability to pay the employee client and at the same time, direct that the lawyer not tell the employee. The parties agree that, in the event that an actual conflict were to arise, the lawyer may withdraw from representing Charles and continue to represent the Company in this matter. This means that Charles would have to hire a new lawyer and pay new legal fees in order to obtain legal advice with respect to this matter. The parties also understand that each could hire separate counsel at the outset of this matter or later, in which case, any information received by the respective new counsel would remain confidential. However, the parties have agreed to the arrangement specified in this paragraph and by signing this engagement letter, they confirm that they have had an opportunity to speak directly with the lawyer about this waiver, have had all their questions answered regarding this, and now provide their informed consent.

Analysis

The conflict analysis for this hypothetical will necessarily involve the answers to the following questions:

Who is the client?

Following the same analysis as the original scenario, the Company and Charles are joint clients.

Is there a potential or actual conflict?

Yes, there is an actual conflict because Charles has told the lawyer that he plans to leave as soon as he becomes "portable." Charles had previously consented to share confidential information in the engagement letter, but he is now orally revoking that consent. Furthermore, the fact that Charles plans to leave when he becomes "portable" creates a conflict of interest per se. The Company would reasonably expect to be informed of such revelations due to the agreement in the engagement letter to share confidential information, except for financial documents. The interests of the Company and Charles are no longer aligned and there is clearly a conflict of interest. The lawyer may not be able to share Charles's arguably confidential information with the Company if Charles orally revoked his permission to share confidential information prior to sharing it. If he shared the information prior to revoking this permission, then the lawyer would have an obligation to share the information with the Company and should be able to do so despite the objections of Charles. Under the best-case scenario, Mary might have had the immediate opportunity to advise Charles to stop talking as soon as he gave any indication that he was going to reveal confidential information that he did not want shared. At that point, she could have reminded Charles of the advance conflict waiver, which granted her permission to share Charles's information with the employer. If Charles revoked his waiver then Mary would not be able to provide the information to the Company.

Mary may not share the financial documentation with Charles. Pursuant to Comment 31 of Rule 1.7, the Company had a right to refuse to share the financial documentation with Charles and Charles agreed to that caveat in the waiver. An agreement to keep some information confidential is a reasonable exception to the general rule that confidential information must be shared in dual representation.[155]

Given that there are conflicts, are they subject to consent (also referred to as "waivable")?

The conflict at issue here falls within the definition of a concurrent conflict described in MR 1.7(a)(2). Clearly there is a substantial risk that Mary's ability to provide diligent and competent representation to both Charles and Joe would be materially limited by her competing duties to them individually. The Company would not want to spend its time and resources only to have the employee quit before the process is complete. As a conflict has now arisen, Mary must withdraw from representing the employee, but she could reasonably continue her representation of the company with the remaining steps in the representation, such as notifying USCIS of any termination, if required, based on Charles' nonimmigrant status, since as discussed below, Charles has so agreed in the waiver.

If so, is the consent informed and confirmed in writing?

Yes, the consent in this case appears to be informed and is certainly confirmed in writing. Here, the engagement letter explains the material risks and the reasonably available alternatives to the proposed course of conduct as required by MR 1.0(e), MR 1.7(b), Comment 22 to MR 1.7, MR 1.9(b) and Comment 9 to MR 1.9. Therefore, Mary may continue with her representation of the Company per the express terms of the advance waiver.

Conclusion

With this variation, a conflict has clearly arisen. However, the advance conflict waiver should be enforceable because it is carefully drafted and describes the material risks and the reasonable available alternatives to having such a waiver. In this case, Mary may no longer continue to represent Charles, but she can continue to represent the Company even if Charles were to later raise objections to such representation. The entire purpose of the advance conflict waiver language, indicating who a lawyer may continue to represent in the event of an irresolvable conflict, is to preclude a party from later objecting to further representation of another party in the first place.

[155] As discussed above, generally when a lawyer has had a previous and perhaps also a long-standing relationship with the employer, the lawyer would be wise to disclose that relationship to the employee and where applicable, that the employer may request that the lawyer keep strategic or propriety information confidential.

Hypothetical Six: Investment-Based Permanent Residency

George, an immigration lawyer, is engaged by Juanita, a wealthy foreign national, to represent her in connection with an EB-5 petition to pursue investment-based permanent residency. Juanita has no business background. She is an unpublished poet who lives on trust fund money. She asks George if he knows of any participating regional centers and George directs her to a regional center (RC) whose CEO is George's childhood friend and former college classmate, which George does not disclose. George represents RC in EB-5 investment matters.

Juanita decides to invest in an RC project and file an EB-5 petition. Juanita and RC's CEO sign a joint legal services agreement with George. With respect to confidentiality and conflicts of interest, the agreement states as follows:

Joint representations may impact on the issue of confidentiality and conflicts of interest. Lawyer will not maintain the confidentiality of any statements made to the Lawyer as between RC and Juanita. If either client directs Lawyer to maintain confidentiality as to the other client, Lawyer may have to withdraw from this representation in its entirety. If so, the Lawyer may continue to represent RC in any other pending or future immigration cases.

The legal services engagement agreement makes no mention of George's friendship with RC's CEO. Several months into the representation, George learns from his friend that there has been a lot of community opposition to the project, which will certainly result in substantial delays. George's friend tells him that although he is reasonably confident that the viability of the project has not been compromised, the project will take much longer to complete. He asks George not to disclose that information to Juanita.

Analysis

This scenario presents the classic problem of dual representation in business matters in which there are potential conflicts between the clients and those between a client and the lawyer's personal and professional interests.

The conflict analysis for this hypothetical will necessarily involve the answers to the following questions:

Who is the client?

Here according to the clear language of the engagement agreement, both Juanita and RC are deemed joint clients.

Is there a potential or actual conflict?

Potential Conflict:

As alluded to in the engagement agreement, there may be potential conflicts of interest between Juanita and the RC, although the types of conflicts that may occur are not described. Because Juanita is not a sophisticated investor, better practice would have been to describe the circumstances under which conflicts could arise. Any potential conflict would be exacerbated by George's failure to disclose to Juanita that he and the CEO of RC have had a personal relationship that pre-dates any professional relationship. Arguably, that friendship could have affected George's objectivity in referring Juanita to the RC in the first instance and his duty of loyalty to Juanita regarding the confidential information. Once George becomes privy to RC's information that is relevant to the representation, his duty of confidentiality to RC could be in conflict to his duty of loyalty to Juanita.

Actual Conflict:

Once the CEO informs George about problems causing a delay and requests that George keep the information confidential, George now has an actual conflict concerning competing duties of loyalty. In effect, the CEO has revoked his waiver of confidentiality. The fact that RC does not believe that the delay will affect the viability of the project, and presumably its impact on the EB-5 petition, is not relevant. In the normal course this would still be information that Juanita would want, and needs, to know. Without RC's consent to disclose that information to Juanita, George would be required to withdraw from representation of both clients.

If so, is the conflict consentable (also referred to as "waivable")?

Here, the potential or actual conflicts between an EB-5 investor and an RC would be waivable if the representation were not otherwise prohibited under MR 1.7(b)(2) [prohibited by law] or MR 1.7(b)(3) [involving opposing representation in same litigated matter]. If George has a reasonable belief that any potential conflict would not materially limit his ability to provide competent and diligent representation to either Juanita or the RC, he may seek to obtain a waiver under MR 1.7(b)(1) and MR 1.7(b)(4). The waiver—whether given in advance or once an actual conflict arose—would have to be based on informed consent. Here, there is what appears to be waiver of confidentiality, but whether or not it would be enforceable would depend on whether the consent was informed.

If so, is the consent informed and confirmed in writing?

Here, the engagement agreement provides some, but arguably not enough information to deem Juanita's "consent" to any waiver in the agreement to be "informed." George has not disclosed his long-standing personal relationship with the CEO and his professional/financial interest in maintaining the RC as a client. Because Juanita is not a sophisticated investor, or apparently experienced in dealing with lawyers, the burden on George to provide as much information about the pros and cons of dual representation in an EB-5 matter is significant.

George's failure to advise Juanita that he has a personal relationship with RC also implicates duties imposed under MR 1.4 and MR 1.8. Under MR 1.4, a lawyer is required to keep the client apprised of information relevant to the matter in order to make informed decisions as to the representation. Under MR1.8(b) a "lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules." To the degree that George has obtained confidential information about RC and Juanita, respectively, upon withdrawal, he would be prohibited from using that information to the disadvantage of either.

Conclusion

Given that George has an actual conflict, he will have to withdraw from representing both clients in the EB-5 matter. Because there is no evidence to suggest that George's referral of the RC to Juanita was influenced by any conflicting professional interest, George's failure to advise Juanita about his personal relationship with the CEO in the engagement should not, as a practical matter, raise an issue as to her consent to the joint representation. However, in a malpractice action against George, she could argue both that George was not sufficiently objective and that this was information that would have strongly influenced her decision-making. Best practice would have been for George to include a disclosure in the agreement. Best practice also would have been to explain to Juanita the pros and cons of joint representation in such matters.

Hypothetical Seven: Business Visas

Hans, a German businessman, retains Joanna to assist with immigration issues related to a new U.S. company. Hans, who wholly owns an auto parts manufacturing business in Germany, has established a 50-50 joint venture with a French auto parts company to create a new U.S.-based auto parts manufacturing company. The new U.S. company (the "Company") will employ managers and executives currently employed by both Hans's German company and the French company. The immigration legal work to be performed involves procuring E-2 visas for Hans, who will be the CEO of the Company and the five other foreign national employees who will be essential employees. German employees may obtain legal status through E-2 visas if the Company is at least 50% owned by German nationals. If the German owner obtains lawful permanent residence in the U.S., his ownership interest will no longer be considered in determining whether the Company qualifies as an E-visa employer.

Joanna prepares a separate written engagement agreement for each visa candidate to be signed by each of them. Each agreement clearly states that Joanna is performing the necessary legal services to obtain E-2 visas on a multiple representation basis, requiring that each of the clients agree to waive confidentiality as between the affected employee and the Company. Because each engagement agreement is separate, confidentiality would not be waived between any one employee and any other. The agreement explains in clear language that information

imparted to Joanna by the CEO may be shared with each of the employees, with one exception, i.e., information concerning "proprietary" or strategic business plans of the Company or its foreign parent companies. Further, any information shared by any employee would only be shared with the CEO.

Joanna is successful in obtaining the E-2 visas for Hans and the other foreign national employees and their families, where applicable. Afterward, Joanna requests that each person in E-2 visa status send her any new I-94 information whenever they travel abroad and re-enter the U.S. She advises that she needs this information so that she can monitor their compliance with the time limitations of the visas.

Three years pass and Hans contacts Joanna about changing his status by seeking permanent residency. The French partner of the Company has been advised and has no objection. Hans wants to start the process before his son, now 20, reaches the age of 21, as this will ensure that Hans's family can remain in the US.

Lawyer Joanna understands that Hans's decision to change his status from an E-2 visa to permanent residency will have negative consequences for the German E-2 visa employees. As a result of Hans's change in status from E-2 visa to lawful permanent, the Company would no longer be eligible to employ German nationals in E-2 visa status.[156]

Hans tells Joanna he considers the information about his change in status plans for U.S. permanent residence to fall within the exception to the confidentiality waiver – i.e., that she may not disclose – because the information concerns a "strategic business plan of the Company or its foreign parent companies." He tells her she must keep this information confidential from the other foreign national employees.

Analysis

This scenario presents multiple problems for Joanna in light of the fact that the Company, Hans and the foreign national employees (mainly the German employees) appear to have conflicting interests. Although each of the clients agreed to waive confidentiality as between each other, one client, Hans, is claiming that certain information he imparted to the lawyer must be kept confidential and he has also asked her to represent him alone in a matter that could have a materially adverse effect on other clients in the representation.

The conflict analysis for this hypothetical will necessarily involve the answers to the following questions:

Who is the client?

In accordance with the separate signed engagement agreements, Joanna's clients in this matter are Hans, the Company and the five foreign nationals. Since completion of the initial work, Joanna has had an ongoing responsibility to monitor her client's E-2 Visa status. Both Hans and the German employees had every reason to believe that they were still current clients and they would be deemed so. Since they are current clients, conflicts would be governed by MR 1.7.

Is there a potential or actual conflict?

The engagement agreements signed by each of the clients clearly explain that Joanna is representing multiple clients in the same matter and that confidentiality will be waived, except for certain information pertaining to the Company. Clearly there are potential conflicts in that at some point the interests of the various clients might diverge. But none are mentioned in the agreement and there is also no mention of what action would be taken should an irresolvable conflict occur. As of the inception of the representation, there are no actual conflicts. However, once Hans advises Joanna about his intent to pursue U.S. permanent residency, Joanna is faced with an actual conflict as it relates to confidentiality. Hans has asserted that the information he has imparted is covered by the "proprietary" and "strategic information" carve-out concerning the Company's information. Assuming Hans is correct, Joanna would not be able to tell the German employees about his plans as they affect the Company. However, the German employees would naturally want to be advised about any factors that would impact their E-

[156] The German nationals arguably could qualify for L-1 status, may be able to find other employment, or explore other options to stay.

2 visa status if for no other reason than to explore other avenues to remain employed with the Company in the U.S. or to remain in the country in a valid immigration status. They might choose to look for other employment that would give them the same E-2 visa benefit, for example. Because Hans's demand to conceal such information would interfere with Joanna's ability to provide competent and diligent representation to the German employees, absent a waiver of confidentiality as to his plans from Hans, Joanna would have to withdraw from the entire representation. As we discuss below, if she decided to withdraw, and then agreed to represent Hans in seeking permanent residency, there would be a question of whether she was still conflicted under MR 1.9 (former client conflict), in particular if Han's permanent residency matter were deemed substantially related to the first matter. It is arguable that Joanna's representation of Hans in obtaining permanent residency would be deemed to be substantially related to her representation of the German employees in obtaining E-2 visa status. We discuss that issue below.

If so, is the conflict consentable (also referred to as "waivable")?

Hans's information and confidentiality:

While it is arguable that the information Hans has imparted to Joanna is not covered by the confidentiality carve-out, Joanna ought to err on the side of caution and accept his characterization. Even if the information were clearly not within the carve-out, by telling Joanna that she cannot disclose the information, Hans would be essentially revoking his waiver of confidentiality and she would be in the same position. Joanna would have to abide by his decision, except that she would have to advise the others that Hans has essentially rescinded the original waiver he had agreed to in the respective engagement agreements. This would trigger an actual conflict that could only be resolved if Joanna could persuade Hans to give his informed consent to disclose the information. Here, because Joanna invited all of her clients to keep her posted on their foreign travel, it appears that all of her clients would be deemed current clients for purposes of the current conflict rule. This would be the likely conclusion, especially in the absence of any affirmative action by Joanna advising Hans and the other employees that the representation was terminated upon completion of the E-2 visa work. Under the current conflict rule, if Hans or the Company refused to consent to share the new information, Joanna would be forced to withdraw from the representation of all the clients on the basis that she could not provide competent and diligent representation to the German nationals without disclosing the Company's confidential information.

Further representation of Hans:

Current Client Conflict: Yes

Under the current conflict rule, Joanna's further representation of Hans in obtaining permanent residency, without disclosing this representation to the other clients would clearly come within the reach of MR 1.7(a)(2), which requires the affected parties' informed consent. Joanna could not likely obtain the German employees "informed consent" to represent Hans in the permanent residency without explaining the nature of the representation, which is exactly what Hans has prohibited her from disclosing. Upon withdrawal, all Joanna's current clients in the E-2 Visa matter would become "former" clients and she would be subject to the requirements of MR 1.9.

Former Client Conflict: Most likely, Yes.

Here the applicable sub-section is MR 1.9(a), which prohibits a lawyer from representing a client in the same or a substantially related matter in which the current client's interests are materially averse to the interests of the former client. Hans' interest in permanent residence is materially adverse to the interests of the E-2 employees in maintaining their valid nonimmigrant status. When Hans becomes a permanent resident, the others lose their E-2 status. Because the materially adverse interests arise from the same or substantially related matter, without a waiver, under MR 1.9(a) Joanna would also be prohibited from representing either Hans or the German employees.

If Joanna has to withdraw from representation of both Hans and the German employees, they become "former" clients and MR 1.9 controls. The "hot potato" scenario under MR 1.9, referred herein, prevents Joanna from dropping the German employees as clients in order to represent Hans.

Conclusion

Here Joanna failed to obtain client consent to potential conflicts of interest that would impact on her later representation of Hans. Without Han's consent to disclose his intention to change from E-2 visa status to permanent residency status, Joanna would have an unresolved current client conflict and she would have to withdraw from the representation. Upon withdrawal, absent the German employee's consent to represent her now former client Hans, Joanna would be faced with an unresolvable former client conflict and she would have to decline further representation of Hans.

E. Summary of State Variations of Model Rule 1.7

State Variations that are the Same or Similar to ABA Model Rule 1.7

Most state versions of Model Rule 1.7 ("MR 1.7") contain the same or essentially the same language as MR 1.7.

Twenty-eight states have adopted the rule verbatim, including:

Colorado	**Missouri**	**South Dakota**
Connecticut	**Montana**	**Utah**
Delaware	**Nebraska**	**Vermont**
Illinois	**Nevada**	**Virginia**
Indiana	**New Mexico**	**Washington**
Kansas	**North Carolina**	**Wisconsin**
Louisiana	**Oklahoma**	**West Virginia**
Maryland	**Pennsylvania**	**Wyoming**
Massachusetts	**Rhode Island**	
Minnesota	**South Carolina**	

Others have adopted a version of the Model Rule that largely mirrors its language, but includes additional provisions or uses terms not included in the Model Rule. Those states are:

Arizona

Arkansas

California

Kentucky

Iowa

Maine

Because the state versions of MR 1.7 listed above are the same or essentially the same, we do not discuss them in further detail.

State Variations that Differ From Model Rule 1.7

The remaining state variations differ from the Model Rule in several ways. For example, certain states do not require informed consent confirmed in writing. Others may expressly provide specific factors to be discussed to establish informed consent. Some states do not use the term "informed consent," but retain its functional equivalent.

We discuss the remaining state versions of MR 1.7, whose variations are more significant, below:

Alabama

Alabama's version of MR 1.7 differs in several ways. Unlike MR 1.7, which requires that a lawyer has a "reasonable belief" in the lawyer's ability to provide "competent and diligent" representation,[157] Alabama's variation focuses on the "adverse effect" the representation would have on the lawyer's relationship with his/her other client.[158]

Alabama's rule does not use the term "informed consent" and does not require client consent to a conflict in writing. Alabama's Rule forbids lawyers from representing a client where such representation will be "directly adverse to another client"[159] or "may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests,"[160] unless the affected clients "consent[] after *consultation*" (emphasis added).[161] Under Alabama's rule, such consultation must include an explanation of "the implications of the common representation and the advantages and risks involved"[162] when a lawyer represents multiple clients in a single matter.

Alaska

Alaska's version of Rule 1.7 adopts MR 1.7 in its entirety, but includes two additional requirements. First, Alaska's rule requires a lawyer to act with "reasonable diligence" in determining whether a "conflict of interest" exists.[163] Second, under Alaska's Rule, the term "client" does not include identified or unidentified members of a class in a class action.[164]

District of Columbia

Like MR 1.7, the District of Columbia's ("D.C.") rule prohibits representation of one or more clients if that representation would be "adversely affected by the lawyer's responsibilities to or interests in a third party"

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[157] "A lawyer may represent a client if: the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client." MR 1.7(b)(a).

[158] "The lawyer reasonably believes the representation will not adversely affect the relationship with the other client." AL Rule 1.7(a)(1).

[159] "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client." AL Rule 1.7(a).

[160] "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or third person, or by the lawyer's own interest." AL Rule 1.7(b).

[161] "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and each client consents after consultation." AL Rule 1.7(a)(1)(2).

[162] "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." AL Rule 1.7(b)(2).

[163] "A lawyer shall act with reasonable diligence in determining whether a conflict of interest, as described in paragraphs (a) and (b) of this rule, or Rules 1.8, 1.9 and 1.10 exists." AK Rule 1.7(c).

[164] "For purposes of this rule, the term "client" does not include unidentified members of a class in a class action or identified members of a class when individual recovery is expected to be de minimis." AK Rule 1.7(d).

without the client's informed consent.[165] That same provision, however, also prohibits a lawyer from representing a client where "the lawyer's own financial, business, property, or personal interests" would negatively impact such representation without the client's informed consent.[166]

D.C.'s version also places specific requirements on a lawyer seeking a client's informed consent not included in MR 1.7. Specifically, the D.C. rule states that a lawyer must fully disclose "the existence and nature of the possible conflict and the possible adverse consequences of such representation."[167]

Florida

Florida's version of MR 1.7 is substantially similar, but adds certain requirements to attaining informed consent. Florida's version first requires confirmation of informed consent either "in writing or stated clearly on the record at a hearing."[168] In addition, Florida, expressly requires a lawyer representing multiple clients in a single matter to explain "the implications of the common representation and the advantages of the risks involved."[169]

Georgia

Georgia's version of MR 1.7 is substantially similar, but adds certain requirements to attaining informed consent. Unlike MR 1.7, which only requires that informed consent be confirmed in writing, Georgia requires that a lawyer provide "reasonable and adequate information about the material risks of and reasonable available alternatives to the representation" in writing to potentially affected clients before informed consent can be obtained.[170] Georgia further expressly requires that lawyers provide potential clients with the opportunity to review this writing with independent counsel before giving his/her informed consent.[171]

Georgia's version also utilizes slightly different language than MR 1.7 when describing representations that lawyers must not undertake. While MR 1.7 prohibits a lawyer from representing a client if the representation involves a claim by one client against another "in *the same litigation or other proceeding*," Georgia's rule prohibits representations involving a claim by one client against another "in *the same or substantially related* proceeding" (emphasis added).[172]

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[165] "The lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer's responsibilities to or interests in a third party or the lawyer's own financial, business, property, or personal interests." D.C. Rule 1.7(b)(4).

[166] Id.

[167] "A lawyer may represent a client with respect to a matter in the circumstances described in paragraph (b) above if (1) Each potentially affected client provides informed consent to such representation after full disclosure of the existence and nature of the possible conflict and the possible adverse consequences of such representation." D.C. Rule (c)(1).

[168] "Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if: each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing." FL Rule 4-1.7(b)(4).

[169] "When representation of multiple clients in a single matter is undertaken, the consultation must include an explanation of the implications of the common representation and the advantages and risks involved." FL Rule 4-1.7(c).

[170] "[A] lawyer may represent a client if each affected client gives informed consent, confirmed in writing." M.R. 1.7(b)(4). If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after: (1) consultation with the lawyer, pursuant to Rule 1.0(c); (2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation." GA Rule 1.7(b)(1)(2).

[171] "If client informed consent is permissible a lawyer may represent a client notwithstanding a significant risk of material and adverse effect if each affected client or former client gives informed consent, confirmed in writing, to the representation after: (1) consultation with the lawyer, pursuant to Rule 1.0(c); (2) having received in writing reasonable and adequate information about the material risks of and reasonable available alternatives to the representation; (3) having been given the opportunity to consult with independent counsel." GA Rule 1.7(b)(1)(2)(3).

[172] "Client informed consent is not permissible if the representation (2) includes the assertion of a claim by one client against another client represented by the lawyer in the same or substantially related proceeding." GA Rule 1.7(c)(2).

Georgia further prohibits a lawyer from undertaking a representation, regardless of whether informed consent is obtained, where it "involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation." As in the case of other rules of professional conduct, Georgia specifically states that the maximum penalty for violation of the rule – in this case – is disbarment.[173]

Hawaii

Like Alabama, Hawaii does not use the term "informed consent" in its variation of MR 1.7, but places similar requirements on lawyers seeking to undertake representations involving a potential conflict of interest. Specifically, Hawaii requires lawyers seeking to represent multiple clients in a single matter to explain "the implications of the . . . representation[], including both the advantages and risks involved."[174]

Idaho

Idaho's version of MR 1.7 adopts the Model Rule, but specifies that a concurrent conflict of interest can also occur where there is risk that a representation will be "materially limited" by "the personal interest of the lawyer, including family and domestic relationships."[175]

Michigan

Michigan's version of MR 1.7 adopts portions of the Model Rule, but includes several important deviations. Unlike MR 1.7, which measures whether a lawyer can provide his/her clients with "competent and diligent" representation in the face of a potential conflict of interest, Michigan's rule measures the "adverse effect" a conflict of interest will have on a lawyer's existing client(s).[176]

In addition, Michigan's rule requires that a lawyer explain potential conflicts of interest to affected clients, which includes "advantages and risk involved," and obtaining "consent after consultation." However, it does not use the term "informed consent" or require that such "consent" be memorialized in a writing.[177]

Mississippi

Noteworthy is the fact that while following the essential conflicts principles of MR 1.7, Mississippi's version does not include a per se prohibition of representation of opposing parties in the same litigation. However, the Comment titled "Conflicts in Litigation" states that paragraph Rule 1.7(a) "prohibits representation of opposing parties in litigation, including both parties to a divorce action." Mississippi also does not articulate in the Rule itself criteria under which a representation burdened by a conflict may go forward. Lawyers are urged to review the Comments and Mississippi Bar Ethics Opinions for further guidance.[178]

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[173] "Client informed consent is not permissible if the representation: (3) involves circumstances rendering it reasonably unlikely that the lawyer will be able to provide adequate representation to one or more of the affected clients. The maximum penalty for a violation of this Rule is disbarment." GA Rule 1.7(c)(3).

[174] "When representation of multiple clients in a single matter is contemplated, the consultation shall include explanation of the implications of the common representations, including both the advantages and the risks involved." HI Rule 1.7 (c).

[175] "A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interests of the lawyer, including family and domestic relationships." ID Rule 1.7(a)(2).

[176] "A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client." MI Rule 1.7 (a)(1).

[177] "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." MI Rule 1.7(b)(2). "A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless: the client consents after consultation." MI Rule 1.7(b)(2).

[178] "Paragraph (a) prohibits representation of opposing parties in litigation, including both parties to a divorce action. See MSB Ethics Opinion No. 80. Simultaneous representation of parties whose interests in litigation may conflict, such as co-

Mississippi's version of MR 1.7 replaces the term "informed consent" with "knowing and informed consent," but does not expressly require that such "knowing and informed consent" be confirmed in writing.

New Hampshire

New Hampshire's version of MR 1.7 adopts the Model Rule in its entirety, but adds a provision specifically concerning public defenders. Sub-section 1.7(c) provides limitations on state public defenders from representing certain individuals otherwise involved with other representations undertaken by the office. Specifically, the Rule only allows a public defender to represent an individual for arraignment *if* that individual is not a co-defendant of an individual represented by the office or a witness for a client represented by the office.[179]

New Jersey

New Jersey's version of MR 1.7 adds two provisions to its rule. First, New Jersey explicitly requires an attorney representing multiple clients in a single matter to explain "the common representation and the advantages and risks involved."[180] Second, New Jersey holds that a public entity cannot give informed consent to a potentially conflicted representation.[181]

New York

New York's version of MR 1.7 largely adopts the Model Rule, but contains certain distinctions. First, New York's rule prohibits a lawyer from representing a client if a "reasonable lawyer" would conclude that circumstances creating a conflict of interest exist.[182] Second, New York's rule expands the circumstances triggering a conflict of interest from those where a potential client's interests are "directly adverse" to an existing client to those where a potential client has merely "differing interests" from an existing client.[183] Third, New York's rule focuses on whether a lawyer's other responsibilities and interests will "adversely affect" (rather than "materially limit") his/her judgment in the contemplated representation.[184]

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plaintiffs or co-defendants, is governed by paragraph (b). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of paragraph (b) are met." Comment to Mississippi Rule 1.7.

[179] "[A] lawyer from the New Hampshire Public Defender Program may represent an individual for arraignment if that individual is not: (1) a co-defendant of a defendant also represented by the New Hampshire Public Defender Program." N.H. Rule 1.7(c)(1). "[A] lawyer from the New Hampshire Public Defender Program may represent an individual for arraignment if that individual is not: (2) a witness in a case in which the New Hampshire Public Defender Program represents a client and it is a case in which the New Hampshire Public Defender Program determines that there is a significant risk that the representation of the witness will materially limit the lawyer's responsibilities to the existing client." N.H. Rule 1.7(c)(2).

[180] "Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved." N.J. Rule 1.7(b)(1).

[181] Id.

[182] "[A] lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests." N.Y. Rule 1.7(a)(1)(2).

[183] "[A] lawyer shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing differing interests." N.Y. Rule 1.7(a)(1).

[184] Id.

North Dakota

North Dakota's Rule differs from MR 1.7 in several important respects. First, North Dakota's rule specifies which type of attorney action, if adversely affected, would preclude representation. Specifically, North Dakota prohibits representation if the lawyer's ability to "consider, recommend, or carry out a course of action" is adversely affected by the interests of another client, third person, or the lawyer's own interests.[185] North Dakota also eliminates "former clients" from the list of entities that should be considered when determining whether a conflict of interest exists.[186]

Second, North Dakota lowers the threshold for prohibiting representation. Under MR 1.7, representation of a client is prohibited if the undertaking "will be directly adverse" to another client.[187] Comparatively, North Dakota prohibits representation where representation "might be adversely affected" by the lawyer's duties to other clients or interests.[188]

Third, North Dakota expressly requires a full explanation of the risks and advantages of common representation.[189] Fourth and finally, North Dakota prohibits a lawyer from using information from a representation to that client's disadvantage without his/her consent, which does not need to be "informed."[190]

Ohio

Ohio's version of MR 1.7 largely adopts the language of the Model Rule with certain distinctions.[191] First, Ohio replaces the phrase "significant risk" with "substantial risk" when outlining the circumstances that create a conflict of interest.[192] Second, Ohio only permits representation of a client despite a conflict of interest where the lawyer "will be able" to provide competent counsel to each affected client.[193]

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[185] "A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." N.D. Rule 1.7(a).

[186] Id.

[187] "A concurrent conflict of interest exists if (1) the representation of one client will be directly adverse to another client." M.R. 1.7(a)(1).

[188] "A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests." N.D. Rule 1.7(c).

[189] "When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved." N.D. Rule 1.7(c)(2).

[190] "Except as required or permitted by N.D.R. Prof. Conduct 1.6, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation." N.D. Rule 1.7(d).

[191] "A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies (1) the representation of that client will be directly adverse to another current client; (2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests." OH Rule 1.7(a)(1)(2).

[192] Id.

[193] "A lawyer shall not accept or continue the representation of a client if a conflict of interest would be created pursuant to division (a) of this rule unless all of the following apply: (1) the lawyer will be able to provide competent and diligent representation to each affected client; (2) each affected client gives informed consent, confirmed in writing; (3) the representation is not precluded by division (c) of this rule." OH Rule 1.7(b)(1)(2)(3).

Oregon

Oregon's version of MR 1.7 contains a number of deviations from the Model Rule. First, Oregon states that a conflict of interest may also exist if the lawyer is related to another lawyer in a matter adverse to the client either biologically or through domestic partnerships.[194]

Second, Oregon permits representation if the lawyer is not "obligate[d] . . . to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client."[195] Third and finally, Oregon replaces the term "concurrent conflict of interest" with "current conflict of interest."[196]

Tennessee

Tennessee's version of MR 1.7 differs from the Model Rule in one material respect by extending the rule to criminal or juvenile actions.[197] Under Tennessee's rule, in criminal or juvenile cases, the lawyer must establish before a tribunal that "good cause exists to believe that no conflict of interest . . . presently exists or is likely to exist."[198]

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This chapter of the AILA Ethics Compendium is written by Sherry K. Cohen and reviewed and produced by the 2016-17 AILA National Ethics Committee (Alan Goldfarb, Chair and Kenneth Craig Dobson, Vice Chair) and the AILA Practice & Professionalism Center.

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[194] "A current conflict of interest exists if: (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter." OR Rule 1.7(a)(3).

[195] "A lawyer may represent a client if: (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client." OR Rule 1.7(b)(3).

[196] "This is essentially identical to the ABA Model Rule, except for the addition of paragraphs (a)(3) and (b)(3) discussed above; also, the Model Rule uses the term "concurrent" rather than "current." The Model Rule allows the clients to consent to a concurrent conflict if "the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." Comment to Oregon Rule 1.7.

[197] "A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless: 1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist; and 2) each affected client gives informed consent." TN Rule 1.7(c)(1)(2).

[198] "A lawyer shall not represent more than one client in the same criminal case or juvenile delinquency proceeding, unless: 1) the lawyer demonstrates to the tribunal that good cause exists to believe that no conflict of interest prohibited under this Rule presently exists or is likely to exist." TN Rule 1.7(c)(1).

American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.9
Duties to Former Clients

Theo Liebmann, Reporter

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MODEL RULE 1.9 DUTIES TO FORMER CLIENTS

Introduction and Background

A lawyer's duties to avoid conflicts of interest and to maintain confidentiality of case-related information do not end when a representation ends. MR 1.9(a) prohibits a lawyer from representing a party materially adverse to a former client in a matter that is substantially related to the former representation. The rule requires a multi-step analysis to determine whether a representation is prohibited due to a conflict with a former client:

1. The lawyer must first determine whether the "former client" is in fact a former client, or whether the representation continues. If the latter, then Model Rule 1.7 must be used to assess whether a conflict exists.
2. The lawyer must determine whether the matter involving the former client is in the same or a substantially related matter as the matter involving the current party. If not, there is no prohibitive conflict.
3. If the matters are the same or substantially related, the lawyer must determine whether the interests of the person and the current client are materially adverse. If not, there is no prohibitive conflict.
4. If the matters are the same or substantially related, ***and*** the interests of the person and the former client are materially adverse, then the representation of the person is prohibited unless the former client gives informed consent, confirmed in writing.

The rule is structured around two presumptions: (1) if the matters of a former client and current client are the same or "substantially related," a lawyer is presumed to have acquired confidential information from the former client that is relevant to the subsequent representation; and, (2) a lawyer must avoid the untenable position of having a duty to use confidential information acquired in a former representation in order to meet obligations of zealous advocacy, diligence, and effective client counseling to a subsequent client.[1]

> *Example: A lawyer who represented a client in a naturalization application acquired confidential background information about the circumstances of that client's previous marital history. Divorce documents from each of the client's three prior marriages contain allegations of "abusive and inhumane treatment" by the client. The former client subsequently is planning to get re-married, and the prospective spouse seeks the lawyer's advice on the possibility of adjusting status through that marriage. The lawyer is required to protect the confidential information about the previous divorces, but also might potentially required to reveal that information to adequately advise the prospective spouse.*[2]

MR 1.9 is structured so that a former client does not need to disclose the existence and content of confidential information relating to the former representation in order to establish that his former lawyer now has a conflict with representing his new client. If the matters are the same or substantially related, and the interests of the person and the former client are materially adverse, the conflict is simply presumed to exist. That presumption is generally irrebuttable where the matters are the same or substantially related, though there are some exceptions.[3]

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[1] *See* MR 1.3 Comment 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MR Preamble and Scope ¶ 2 ("As advocate, a lawyer zealously asserts the client's positions under the rules of the adversary system."); MR 2.1 ("a lawyer shall exercise independent professional judgment and render candid advice… [and] may refer not only to law but to other considerations such as moral, economic, social and political factors…"); MR 1.4(b)("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions…").

[2] The determination of whether or not two matters such as these are "substantially related" is discussed in the Annotations and Commentary section, *infra*. Note that if the lawyer were representing both spouses in the marriage-based adjustment of status application, this would be a concurrent client conflict situation that would fall under a MR 1.7 analysis.

[3] *See, e.g. Kennedy v. MindPrint (In re ProEduc. Int'l, Inc.),* 587 F.3d 296, 25 Law.Man.Prof.Conduct 612 (5th Cir. 2009) (presumption rebutted where lawyer had switched firms, and showed that her involvement in the prior representation was so slight that it was unlikely she would have acquired confidential information).

The rationale behind the preservation of conflict and confidentiality protections once a representation ends is identical to the purpose of the conflict and confidentiality protections for current clients: if clients thought that, once representation ended, a lawyer could disclose confidential information, or even use confidential information against them, they would be far less likely to divulge that information; consequently, without that free disclosure of information, effective and informed client counseling and advocacy would become nearly impossible.

The conflict and confidentiality protections are, however, more muted for former clients than for current clients. For example, informed consent from a former client, confirmed in writing, makes a conflict waivable regardless of whether the lawyer thinks that the consent is reasonable, or how adverse the interests of the former and current client actually are. For a conflict between current clients, the clients' informed written consent is not enough; the lawyer herself must also have a reasonable belief that she will be able to provide competent and diligent representation in spite of the conflict, and the representation cannot involve a claim by one client against another client.[4] A second example relates to confidentiality: if information about a former client or case has become "generally known," the use of that confidential information by a lawyer, even against the interests of that former client, is permitted; there is no such exception to confidentiality protections for current clients.[5]

Client protection mechanisms are less stringent for former clients than for current clients for two reasons. First, a stricter standard reduces the available choices of legal representation for prospective clients.[6] The more broadly the conflict rules reach, the fewer lawyers there are who can ethically accept a case. Second, a stricter standard makes it more difficult for a lawyer to obtain new clients, especially if the lawyer practices in a less populous area, or in a more specialized practice of law.[7] MR 1.9 attempts to strike a balance between these competing considerations by providing greater latitude for lawyers to overcome conflict of interest prohibitions and confidentiality protections as the connections to the former client become more attenuated.

The duties to former clients consequently become even less stringent where it is the lawyer's ***former*** firm that previously represented the client. MR 1.9(b), like 1.9(a) protects the former client where the two matters are substantially related, and the interests of the former client are adverse to the current client; however, the protections only come into play if the lawyer acquired material, confidential information about the former client while at the lawyer's former firm.[8] For cases where the lawyer actually had access to files, it will be presumed that confidential information was acquired; for cases where the lawyer did not have access to the files, there generally is no such presumption.[9] In addition, a MR 1.9(b) conflict involving a former client of a former firm arises where the lawyer has actual knowledge of the conflict.[10] In other words, ignorance is indeed an excuse when it comes to former clients of a lawyer's former firm. Further, as with MR 1.9(a), any conflict arising out of the lawyer's prior association with a firm is waivable with informed consent of the former client, confirmed in writing.

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[4] *Compare* MR 1.9(a)(allowing conflict waiver where former clients "give informed consent, confirmed in writing," *with* MR 1.7(b)(allowing conflict waiver only where lawyer reasonably believes she will be able to provide competent and diligent representation to each affected client; the representation is not prohibited by law; and the representation does not involve the assertion of a claim by one client against another client in the same litigation or other proceeding before a tribunal; ***even where the clients provide informed consent, confirmed in writing***).

[5] MR 1.9(c) (allowing use of information from former representation to disadvantage of former client where that information has become "generally known.").

[6] *See* MR 1.9 cmt. 4 ("… the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel.")

[7] Id. ("… the rules should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association.")

[8] MR 1.9(b)(2).

[9] See discussion in the Annotations and Commentary section, *infra*.

[10] MR 1.9(b)("A lawyer shall not ***knowingly*** represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client…")(emphasis added).

Example: Lawyer A and Lawyer B worked together at an immigration law firm. Lawyer A represented a client in a family-based application to adjust status. Lawyer B had no knowledge of the case, other than seeing the client's name on the list of active firm cases. The application was successful, and the representation was terminated. Lawyer B eventually moved on to start a new firm of her own. The spouse of the former client now comes to Lawyer B to ask for assistance in filing a VAWA petition based on domestic violence perpetrated by the former client. Because Lawyer B did not acquire any material confidential information about the former client while at the former firm, she may represent the spouse.

MR 1.9(c) addresses confidentiality head on, and makes a distinction between revealing confidential information of a former client, and using that confidential information. As with current clients, lawyers may not reveal information relating to the representation unless permitted by another rule.[11] MR 1.9(c) prohibits the ***use*** of confidential information obtained from a former client as well, but only if it is being used to the disadvantage of the former client.[12] In addition, if the information relating to the representation of the former client has become "generally known," then the lawyer may use that information, even to the disadvantage of that former client.[13]

Example: A lawyer represents a technology company in obtaining H-1B status for a computer science expert from a foreign country. During the course of the representation, the lawyer learns that there are new game software technologies the company hopes the expert can help develop, and also learns that the company believes one of its competitors may already be using those technologies. The H-1B petition is successful and the representation is terminated. The lawyer may not reveal the information about the technologies and the companies. If that information becomes public through, for example, an article in Computer Science magazine, she may use that information in advising a subsequent client with technology expertise on which company/employer is more likely to have long term success, even though that information may be to the "disadvantage" of her former client.

Compliance with MR 1.9 can be challenging, and requires careful record-keeping and conflict-checking mechanisms. In particular, because most portions of the rule create an obligation for lawyers to avoid conflicts regardless of whether or not the lawyer has actual knowledge of the existence of the former client, record-checking will often be the only way that a potential problem can be discovered.[14] Lawyers are not absolved of their responsibility to former clients by merely claiming that they do not remember the client or case.

For immigration lawyers, the duties to former clients can arise in a number of circumstances related to representation of multiple family members, or employers and employees. Information about a former client, for example, might be crucial to establishing eligibility for certain types of benefits or humanitarian relief for other members of that client's family. In work situations, information gained in representing an employer in petitioning for a visa or lawful permanent resident status on behalf of an employee may be relevant to any action the employee may later bring against the employer. Families and employees often seek representation from immigration lawyers they know and trust because the lawyers have previously represented colleagues, employers, and other family members; but where pursuing options or fully advising a client on options might require revealing confidential information of the former client, or even undermining a former client's status or stability, lawyers must proceed with great caution and attention to the rules related to former clients.

[11] MR 1.9(c)(2).
[12] MR 1.9(c)(1).
[13] Id.
[14] The Model Rules' definition of "knowledge" includes situations where a person's knowledge "…may be inferred from circumstances." MR 1.0(f).

Many of the questions that arise from MR 1.9 are similar to those from the other rules that relate to conflicts of interest:[15] What makes matters "substantially related?" At what point do interests become "materially adverse?" What constitutes "informed consent"? Other questions arise uniquely in the context of former clients: When does a client become a "former" client? What protections exist for a former prospective client? What type and amount of acquired information makes that information "material?" What constitutes "using information to the disadvantage" of a client? When does information become "generally known?"

This chapter will review the key terms of MR 1.9; provide annotation and commentary, including addressing the questions listed above; analyze a series of hypotheticals based on realistic scenarios that immigration lawyers may encounter; and describe notable state rule variations from the Model Rule.

A. Text of Rule

ABA Model Rule 1.9 – Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

B. Key Terms and Phrases

"Firm"

The term "firm" is used in MR 1.9(b) and 1.9(c) in relation to conflict and confidentiality protections for former clients of the lawyer's former firm. Under MR 1.0(c) the term "'[F]irm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."

"Knowingly"

Under MR 1.0(f), the terms "knowledge" and "knows" are defined as "actual knowledge of the fact in question" which may be "inferred from circumstances." Under MR 1.9(b), a lawyer is prohibited from representing a person

[15] *See, e.g.*, MR 1.7 (Conflict of Interest: Current Clients); MR 1.8 (Conflict of Interest: Current Clients: Specific Rules); MR 1.10 (Imputation of Conflicts of Interest: General Rule); MR 1.11 (Special Conflicts of Interest for Former and Current Government Officers and Employees); MR 1.13 (Organization as Client); MR 1.18 (Duties to Prospective Client).

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with interests materially adverse to a former client of a former firm, but only where the lawyer acquired material confidential information, and only where the lawyer ***knows*** about the conflict. Therefore, a lawyer who simply does not remember a former client of her former firm will not run afoul of 1.9(b), even if the lawyer actually did acquire material confidential information, and the interests of the current client are materially adverse to the former client. Note, however, that under MR 1.0(f), that knowledge may be inferred. A lawyer's safest course of action would be to keep track of former clients of the former firm with whom the lawyer had substantial personal involvement, and do conflict checks on those cases, as knowledge about those conflicts is more likely to be inferred.

"Informed Consent"

"Informed consent" is used in MR 1.9(a) and 1.9(b). A former client conflict may be waivable if the former client gives informed consent, confirmed in writing. As defined in MR 1.0(e) informed consent denotes "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explained about the material risks of and reasonably available alternatives to the proposed course of conduct." For a former client to waive a conflict, a lawyer must disclose and explain to the former client the nature of the conflict and all of the circumstances and foreseeable ways that the conflict could adversely affect the former client's interests.

"Confirmed in Writing"

"Confirmed in writing" is also used in MR 1.9(a) and 1.9(b) in the context of a former client's waiver of a conflict. As defined in MR 1.0(b), when the phrase is used in reference to the "informed consent" of a person, it denotes consent "that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." As noted in the definition, if a lawyer is unable to "obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." The term "writing" or "written" as defined in MR 1.0(n) is a "tangible or electronic record of a communication or representation" that includes "handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications." The concept of "confirmed in writing" does not require the client to sign the document, but prudent lawyers will strongly consider obtaining client signatures when feasible.

"Materially Adverse"

The term "materially adverse" is used in MR 1.9(a) and 1.9(b). The term describes the adversarial nature of the interests between a prospective client and a former client that, in combination with other factors, can lead to a prohibition on representing the prospective client. The term "material" is not defined in the Rules, but is commonly used in matters of law. It generally means that something is very "important," "necessary" or "relevant" to a substantive aspect of a matter.[16] If a prospective client and a former client are on opposite sides of a litigation or transactional matter, their interests are clearly materially adverse. Material adversity may also exist in less direct circumstances, such as when a lawyer may have to cross-examine a former client on issues that involved a matter similar to the one where the lawyer represented the former client.[17]

"Substantially"

The term "substantially" is used in MR 1.9(a). It denotes the level of relationship between the former client's matter and the prospective client's matter necessary, among other factors, to trigger the conflict question. MR 1.0(l) defines the term substantial "as [denoting] a material matter of clear and weighty importance." For conflict purposes,

[16] *See* definition of "material" in Black's Law Dictionary.
[17] *See* Annotations and Commentary, *infra*, for more discussion.

matters are "substantially related" if "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[18]

C. Annotations and Commentary

Prior Lawyer-Client Relationship

The applicability of Rule 1.9 depends on a person's status as a former client. The initial inquiry in a Rule 1.9 inquiry therefore involves determining both whether the person ever was a client or prospective client, and also whether that former client is in fact still a current client.

Formation of Relationship

A lawyer-client relationship forms when a person manifests the intent to a lawyer to obtain legal services, and either the lawyer manifests consent to do so, or the lawyer reasonably should know that the person is reasonably relying on the lawyer to provide services.[19] Typically, courts have found that a "reasonable belief" hinges on the lawyer's receipt of confidential information from the person, and on the lawyer giving advice.[20]

Because relatively little is necessary for the lawyer-client relationship to be formed—the mere exchange of confidential information from the client to the lawyer, and advice from the lawyer to the client—lawyers must remain alert to what seem like casual exchanges with persons about their legal matters.[21] In the immigration world especially, the stakes can be so high and the consequences so dire that individuals frequently will ask the advice of someone they know to be a lawyer. Most lawyers will want to use their knowledge to assist others, especially those who are acquaintances or friends; it is crucial that lawyers do so with a clear understanding of what type of relationship is being created, and communicate that understanding to the individual, preferably in writing.

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[18] *See* Comment 3 to MR 1.9.

[19] *See* Restatement (Third) of the Law Governing Lawyers §14 (2000). Appointment by the court to represent an individual also creates lawyer-client relationship. Id. The Model Rules do not define when a lawyer-client relationship is formed, though MR 1.18(a) defines a prospective client as "[a] person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter…"

[20] An individual who discloses confidential information and receives legal advice may later be deemed a former client even if the consultation was brief and the lawyer received no fee. *Banner v. City of Flint*, 136 F. Supp.2d 678 (E.D. Mich. 2000) (*aff'd in part, rev'd in part, Banner v. City of Flint*, 99 Fed. Appx. 29 (6th Cir. 2004)); *Hamrick v. Union Twp.*, 79 F. Supp.2d 871 (S.D. Ohio 1999); *Metcalf v. Metcalf*, 785 So. 2d 747; (Fla. Dist. Ct. App. 2001); *People ex rel. Dep't of Corps. v. SpeeDee Oil Change Sys. Inc.*, 86 Cal. Rptr.2d 816, 825 (Cal. 1999) ("An attorney represents a client - for purposes of a conflict of interest analysis - when the attorney knowingly obtains material confidential information from the client and renders legal advice or services as a result."). Former prospective clients therefore also garner protection under the rules. Even where a consultation does not result in a lawyer-client relationship, the lawyer must maintain the confidentiality of the information, and may not subsequently represent a person with adverse interests to the prospective client if the lawyer received information that could be significantly harmful to the prospective client in the matter. MR 1.18(c).

[21] On-line legal services, such as AVVO, create a very murky area around the creation of lawyer-client relationships. Obviously, the provision of advice through an on-line service could create thousands of former clients with whom potential conflicts could exist. For that reason, on-line services typically contain general disclaimers to the effect that no lawyer-client relationship is being established and that the answers do not constitute legal advice as a matter of law. However, such disclaimers may not provide absolute protection to the lawyer from malpractice claims or violation of professional responsibility rules. This area of law is still developing, and a prudent lawyer will proceed very cautiously – including reviewing her jurisdiction's decisions, if any, on this topic, and perhaps also requesting a bar opinion – when providing legal advice via such services.

Some lawyers have tried to argue that the interactions with "accommodation" clients – persons to whom a lawyer offers very brief legal representation as a professional courtesy to another lawyer, or as a favor to another client – are so brief that they should not be afforded the protections of a former client. Courts tend to take a strong stance against this concept, in spite of the fact that the Restatement endorses it.[22] Courts are more likely to permit withdrawal and subsequent representation adverse to an "accommodation" client if the retainer agreement with the "accommodation" client explicitly indicates that the lawyer will represent the "favored" client if a conflict develops.[23]

Current Client vs. Former Client

After determining that a lawyer-client relationship was formed, a lawyer must then determine whether the person continues to be a current client, or should be considered a former client. Current client protections are far more stringent than the protections for former clients, so this determination is significant. The two key differences can be summarized as follows:

- For concurrent clients, a conflict exists when the representation of one client is directly adverse to the interests of another client, even where the two matters are not substantially related;[24] for former clients, a conflict exists only where the two matters are the same or substantially related.[25]
- For concurrent clients, a conflict waiver requires that the lawyer herself reasonably believe that she will be able to provide competent and diligent representation in spite of the conflict;[26] for former clients, the informed consent, confirmed in writing, is enough for a valid waiver.[27]

[22] Restatement (Third) of the Law Governing Lawyers §132 cmt. "i"(2000). *See, e.g., Exterior Sys., Inc. v. Noble Composites, Inc.*, 175 F. Supp. 2d 1112 (N.D. Ind. 2001) (rejecting accommodation-client doctrine); *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000) (rejecting law firm's argument that it was representing particular company only as accommodation to parent corporation). *See generally* Susan R. Martyn, Accidental Clients, 33 Hofstra L. Rev. 913 (Spring 2005).

[23] *See, e.g.*, *In re Rite Aid Corp. Secs. Litig.*, 139 F. Supp.2d 649 (E.D. Pa. 2001) (informed consent may be dropped to its lowest point when there is an "accommodation client"); *Allegaert v. Perot*, 565 F.2d 246 (2d Cir. 1977) (no conflict between "primary" and former client when former had no expectation that information would be kept secret from primary client).

[24] MR 1.7(a)(1).

[25] MR 1.9(a).

[26] MR 1.7(b)(4).

[27] MR 1.9(a).

Here are key differences among the conflict protections for current, former, and prospective clients:

Rule 1.7	Rule 1.9	Rule 1.18
Current clients	Former clients	Prospective clients
A conflict exists for a lawyer where: The representations of two concurrent clients are directly adverse, or there is a significant risk that the representation of one client will materially limit the lawyer's responsibilities to the other client.	A conflict exists for a lawyer where: 1. Representation of a person is in the same matter, or in a substantially related matter, as a former client's matter; and, 2. The interests of the person and the former client in the matter are materially adverse.	A conflict exists for a lawyer where: 1. A client has interests materially adverse to those of a prospective client in the same or a substantially related matter; and, 2. The lawyer received information from the prospective client that could be significantly harmful to the prospective client in the matter.

Generally, a person becomes a former client when the legal matter is resolved.[28] There are many situations, however, where that determination is not straightforward. In particular, any time that a lawyer has represented a client over time, or on a variety of matters, a client may have a reasonable belief that the representation is ongoing.[29] The best way to protect against a misunderstanding in any type of lawyer-client relationship—whether for a short-term single matter or a long-term representation—is a clear letter of withdrawal once the lawyer understands the representation to be terminated.[30]

Courts do not, however, condone the "hot potato" gambit, where a lawyer will terminate a relationship with a current client for the primary purpose of coming under the less stringent former client conflict rules of MR 1.9. This scenario might arise, for example, when there is a conflict between current clients of two firms that are planning a merger, and one of the firms wishes to terminate the relationship with the "less desirable" client so that there will not be a MR 1.7 conflict when the firms join. Courts have almost unanimously prohibited such terminations.[31]

And what if the concurrent client conflict arises through no fault of the lawyer? For example, a corporate client might unexpectedly plan to merge with another corporation, also represented by the lawyer; an additional party may join a lawsuit; or two clients being commonly represented in the same matter might develop adverse interests. In

[28] MR 1.3 cmt. 4. ("If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.")
[29] Id. *See, e.g., IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978); *Mindscape Inc. v. Media Depot Inc.*, 973 F. Supp. 1130 (N.D. Cal. 1997); *SWS Fin. Fund A v. Salomon Bros. Inc.*, 790 F. Supp. 1392 (N.D. Ill. 1992); *Bd. of Managers v. Wabash Loftominium, LLC*, 876 N.E.2d 65 (Ill. App. Ct. 2007).
[30] Model Rule 1.3 cmt. 4. *See Krutzfeldt Ranch, LLC v. Pinacle Bank*, 272 P.3d 635 (Mont. 2012).
[31] *E.g., IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978); *Snapping Shoals Elec. Membership Corp. v. RLI Ins. Corp.*, 2006 WL 1877078 (N.D. Ga. July 5, 2006); *Harrison v. Fisons Corp.*, 819 F. Supp. 1039 (M.D. Fla. 1993); *Pioneer-Standard Elecs., Inc. v. Cap Gemini Am., Inc.*, 2002 WL 553460 (N.D. Ohio Mar. 11, 2002); *Santacroce v. Neff*, 134 F. Supp. 2d 366 (D.N.J. 2001); *Universal City Studios, Inc. v. Reimerdes*, 98 F. Supp. 2d 449 (S.D.N.Y. 2000). The Restatement permits such withdrawals, but only if: (1) it occurs at a point that the client and lawyer had contemplated as the end of the representation; (2) the existing client discharges the lawyer for a cause other than the conflict issue; or (3) if there are other grounds for mandatory or permissive withdrawal. Restatement (Third) of the Law Governing Lawyers §132 cmt. c (2000).

these cases, if the conflict was not reasonably foreseeable, courts will typically allow continuing representation of one client if that representation is otherwise consistent with MR 1.9.[32]

The Substantial Relationship Test

After determining that a person is a former client,[33] the next question in assessing the existence of a conflict is whether the former representation is the same or substantially related to the current representation.

The key to assessing the existence of a "substantial relationship" between the former and current representation is whether it is likely that confidential information obtained in the prior representation would be helpful to advancing the current client's position.[34] The lawyer must avoid placing herself in the untenable position of owing a duty to protect the confidentiality of information obtained in the former representation,[35] while at the same time owing a duty to the current client to use that information to meet her obligation as a loyal and zealous advocate.[36] For example, a lawyer who represented a client in an application to adjust status and obtained information that the client may have engaged in acts of domestic violence against his wife, would have an obligation to protect the confidentiality of that information; but, if later representing the wife in a petition filed pursuant to the Violence Against Women Act (VAWA), would also have a conflicting obligation to use that confidential information.

The question then becomes how to determine whether there is confidential information that would normally have been obtained in the prior representation that would be relevant to advancing the current client's position. Courts have looked at both factual and legal similarities between the two matters to answer that question.[37] The most widely used test comes from the 7th Circuit, and instructs judges considering former client disqualification motions to do the following: (1) consider the scope of the prior representation; (2) determine whether it is reasonable to infer that confidential information from that case would be given to a lawyer in the current case; and, (3)

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[32] Id. *See, e.g.*, *Microsoft Corp. v. Commonwealth Sci. & Indus. Research Org.*, 2007 WL 4376104 (E.D. Tex. Dec. 13, 2007) (permitting lawyer to withdraw because client actively concealed facts creating conflict). *See also* D.C. Ethics Op. 272 (1997) (if certain conditions can be met, law firm may continue to represent longtime regulatory client in adversarial proceeding before administrative agency, even after different client whom it represents on unrelated matters hires separate counsel and unexpectedly initiates administrative proceeding against first client); NYC Bar Op. 2005-5 (attorney may represent one client and withdraw from the other when the conflict was not foreseeable and was "thrust upon" the attorney).

[33] Former client status means both that a lawyer-client relationship was formed in the past, and that the relationship has been terminated. If the relationship was never formed, then the person was not a former client; if the relationship was formed but not terminated, then the person is still a current client.

[34] MR 1.9 cmt. 3 (matters are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." There is some debate on whether the primary impetus behind the rule is the protection of the former client's confidential information, or whether there is also some more nebulous concept of loyalty to the former client. *See, generally*, Charles W. Wolfram, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677 (1997). *See also People v. Frisco*, 119 P.3d 1093 (Colo. 2005) (*en banc*) (Rule 1.9(a) applies to situations involving an "inherent and substantial risk of violating an attorney's duty of loyalty to former clients.").

[35] MR 1.6(a).

[36] *See, e.g.,* Model Rule Preamble ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system"); Model Rule 1.3 cmt. 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); 8 C.F.R. 1003.102 ("Nothing in this regulation should be read to denigrate the practitioner's duty to represent zealously his or her client within the bound of the law.").

[37] The former client conflict question arises primarily in the context of disqualification motions, rather than disciplinary proceedings, so most analysis of this question is in case law. Consistent with the language of the Rule, courts have focused primarily on the ***risk*** of disclosure, not on actual disclosure, in order to prevent the necessity of the former client disclosing confidential information to make the conflict claim. *See In re Cnty. of L.A.*, 223 F.3d 990 (9th Cir. 2000).

determine whether that information is relevant to issues in the current case.[38] Though that test is widely used, it is not universal.[39] There are, however, a number of basic principles that are inherent in most jurisdictions:

- If the two representations involve the same subject matter, they will almost certainly be considered substantially related. For example, where a lawyer defended an employer in a discrimination case, the lawyer could not subsequently represent the employee in a separate discrimination case against the employer where the parties were the same, and the basis of the alleged discrimination was the same, in both actions.[40] Similarly, where a lawyer had jointly represented a couple on business matters, she could not then represent the husband in dissolution proceedings.[41] If the current and former representation merely involve the same ***type*** of case, however, that will not be enough by itself for the matters to be considered "substantially related."[42]
- Where the current representation will require the lawyer to attack her own work in the former representation, the matters are likely to be considered substantially related. This situation typically comes up where the validity or interpretation of a document prepared by a lawyer is being questioned.[43]
- Information about a client's litigation strategies ("playbook" information) will only render matters "substantially related" if that information is of particular relevance or import.[44]
- Positional conflicts on the same legal issue, without more, do not render matters "substantially related." If a lawyer argued in a prior representation, for example, that a certain Department of Homeland Security policy was invalid, the lawyer would not be prohibited from arguing that the policy was valid in a subsequent representation of a different client.[45]
- If the passage of time has rendered information obtained in the prior representation obsolete, the prior representation and current representation are not likely to be considered "substantially related."[46]
- If confidential information obtained in the prior representation has become "generally known," or there is no expectation of privacy in that information, then the two matters are not likely to be considered "substantially related."[47]

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[38] *Westinghouse Elec. Corp. v. Gulf Oil Corp*., 588 F.2d 221, 225 (7th Cir. 1978).

[39] *See, e.g., Gov't of India v. Cook Indus. Inc.*, 569 F.2d 737 (2d Cir. 1978) (requiring issues in current and former representation to be "identical" or "essentially the same"); *City of Atlantic City v. Trupos*, 992 A.2d 762 (N.J. 2010) (matters are substantially related if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against the client in the subsequent representation of a party adverse to the client, or (2) facts relevant to the prior representation are relevant and material to the subsequent representation).

[40] *Pastor v. TWA*, 951 F. Supp. 27 (E.D.N.Y. 1996).

[41] *Fla. Bar v. Dunagan*, 731 So. 2d 1237 (Fla. 1999).

[42] *Khani v. Ford Motor Co.*, 155 Cal. Rptr.3d 532 (Cal. Ct. App. 2013) (lawyer not automatically disqualified from representing plaintiff against company simply because he previously defended company against similar "lemon law" claims); *Walker v. State*, 817 So. 2d 57 (La. 2002) (lawyer who previously represented state in defective road cases not disqualified from subsequently representing clients against state in defective road cases that involve different roadways); *State ex rel. Wal-Mart Stores Inc. v. Kortum*, 559 N.W.2d 496 (Neb. 1997) (firm that represented retail store in slip-and-fall case not disqualified from later representing client in different slip-and-fall case against same store).

[43] *See, e.g., Exterior Sys. Inc. v. Noble Composites Inc.*, 175 Supp.2d 1112 (N.D. Ind. 2001); *Franklin v. Callum*, 782 A.2d 884 (N.H. 2001).

[44] Restatement (Third) of the Law Governing Lawyers, § 132 cmt. d(iii)(2000).

[45] Restatement (Third) of the Law Governing Lawyers, § 132 cmt. d(iii)(2000)("the term 'matter' ordinarily does not include a legal position taken on behalf of a former client unless the underlying facts are also related."). Of course, a lawyer must also comply with MR 3.1 and not present frivolous claims.

[46] Model Rule 1.9 cmt. 3. *See, e.g., Niemi v. Girl Scouts,* 768 N.W.2d 385 (Minn. Ct. App. 2009) (lawyer's knowledge of plaintiff's professional strengths and weaknesses not relevant twenty-five years after former representation). *But see R&D Muller Ltd. v. Fontaine's Auction Gallery*, 906 N.E.2d 356 (Mass. App. Ct. 2009) (although substantial time had elapsed since former representation, firm's knowledge of former client's corporate practices was relevant to current litigation).

[47] Model Rule 1.9 cmt. 3 (Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."); Restatement (Third) of the Law Governing Lawyers, § 132(2)(2000)(current matter

Material Adversity

Even where two matters are the same or substantially related, no conflict exists if the interests of the current client and former client are not materially adverse. The term "materially adverse" is not defined in the rules or commentary, but there is fairly rich case law on the question. The analysis breaks down into two categories: situations where the current and former clients are opponents in litigation, and situations where the former client, though not involved in the litigation as a party, may be adversely affected by it. In the former scenario, courts uniformly find material adversity.[48] In the latter scenario, courts will conduct factual inquiries to determine the likelihood, and extent, of any potential legal, financial, or other identifiable harm to the former client.[49] Those harms include the possibility that the current representation will require the former client to incur legal expenses.[50]

For example, a lawyer who formerly represented a husband in his marriage-based application for lawful permanent residence, and now represents the wife in a divorce proceeding against the husband, is engaging in representation that involves materially adverse interests of a former client (the husband) and the current client (the wife). Another example of material adversity – but one where the former client and current client are not opponents in litigation – is where the lawyer formerly represented the husband in his asylum-based application for lawful permanent residence, and now represents the wife in a VAWA petition which alleges that the husband engaged in domestic violence against her. Here, although the husband and wife are not opponents in the VAWA matter, a court would find that the wife's matter posed an "identifiable harm" to the husband, and determine that the interests of the former client and current client are materially adverse.

Informed Consent and Waiver

Even if a conflict exists between the former and current client, MR 1.9 permits a waiver of the conflict if the former client gives informed consent, confirmed in writing.[51] Informed consent requires the lawyer to communicate "adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[52] In the context of a former client's consent, this will typically involve fully explaining the extent to which the current representation may require the lawyer to proceed in a manner adverse to the former client's interests, as well as the extent to which the current representation may require the lawyer to use or reveal

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and former matter are not "substantially related" where the confidential information from the former matter has become "generally known."). *See State v. 3M Co.*, 845 N.W.2d 808 (Minn. 2014) (in determining whether prior representation is substantially related to current matter, trial court must consider whether confidential information obtained in prior representation was no longer confidential because it had been disclosed to regulatory authorities and public or because former client waived attorney-client privilege by filing suit against firm); *Bongiasca v. Bongiasca*, 679 N.Y.S.2d 132 (N.Y. App. Div. 1998) (information was not confidential where former client would have to disclose it in discovery).

[48] *E.g. Rohm & Haas Co. v. Am. Cyanamid Co.*, 187 F.Supp2d 221 (D.N.J. 2001); *Int'l Longshoremen's Ass'n, Local Union 1332 v. Int'l Longshoremen's Ass'n*, 909 F. Supp. 287 (E.D. Pa. 1995).

[49] *Nat'l Med. Enters. Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996) ("Adversity is the product of the likelihood of the risk of the seriousness of its consequences.").

[50] *Zerger & Maurer LLP v. City of Greenwood*, 751 F.3d 928 (8th Cir. 2014); *In re Epic Holdings*, 985 S.W.2d 41 (Tex. 1998).

[51] Model Rule 1.9(a); 1.9(b)(2). While MR 1.9(c) does not explicitly state that the confidentiality protections for former clients can be waived with informed consent, the rule does state that the protections apply "…except as these Rules would permit or require with respect to a client." That exception would permit disclosure with client consent, pursuant to MR 1.6(a)("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…").

[52] MR 1.0(e).

confidential information of the former client.[53] The consent must be "confirmed in writing,"[54] meaning either a writing by the former client, or a writing by the lawyer confirming oral informed consent.[55] The best practice here, however, is to get a signed writing from the client; lawyers should be very wary of using a writing confirming oral consent, such as a letter to the client, as proof of informed consent, as courts can be skeptical if the consent is later contested.[56]

A lawyer may attempt to avoid the former client conflict issue by seeking advance consent from a client to any future conflicts. This practice is generally permitted, but the consent will only be deemed valid if truly informed. Factors that show "informed" consent in the context of advanced waivers include the specificity of the waiver; whether the explanation of the future representations was comprehensive and included an explanation of foreseeable adverse consequences; the experience of the client; and whether the client signing the waiver had the opportunity to consult with other counsel.[57]

And what about the current client's consent to a conflict with a former client? Is that ever required? Yes, in two contexts. First, to the extent that the lawyer will have to divulge confidential information about the current representation in order to get informed consent from the former client, the current client's consent is required pursuant to Rule 1.6. Second, pursuant to 1.7(a)(2), if there is a "significant risk that the representation [of the current client]… will be materially limited by the lawyer's responsibilities to… a former client," then the informed consent of the current client, confirmed in writing, is required. A "significant risk" that the lawyer's responsibilities will be materially limited might arise, for example, if there were confidential information from the prior representation that the lawyer would not be permitted to use on behalf of the current client.[58]

Rebutting the Presumption of Acquired Information

MR 1.9(b), which deals with conflict protections for former clients of a lawyer's former firm, only comes into play if the lawyer acquired material, confidential information during the representation of the former client by the lawyer's prior firm. While the presumption will be that the lawyer acquired protected information about the former client while at the former firm, that presumption can be rebutted.[59] The lawyer can rebut the presumption most convincingly by presenting evidence that she had no access to files of the former client and did not participate in any discussions of the former client's affairs.[60] A lack of participation could be shown, for example, with evidence

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[53] Restatement (Third) of the Law Governing Lawyers, § 122 cmt. c(i)(2000).
[54] The "confirmed in writing" provision is one of the clauses of MR 1.9 where there is most variation among the states. *See* State Rule Variations, *infra*.
[55] *See* MR 1.0(b). The writing confirming oral informed consent must be sent to the former client within a reasonable time after the consent is given. Id.
[56] *See, e.g., Discotrade Ltd. V. Wyeth-Ayerst Int'l Inc.*, 200 F. Supp.2d 355 (S.D.N.Y.2002). While there is no deadline by which a former client must raise a conflict issue, or respond to a request for consent, long delays by a party in bringing a motion to disqualify counsel, if used as a tactical device, can constitute a waiver. *See, e.g., Cent. Milk Producers Coop. v. Sentry Food Stores, Inc.,* 573 F.2d 988 (8th Cir. 1988) (court denies motion to disqualify where movant delayed filing motion as a "tool" to deprive opposing party of choice of counsel); *Rohm & Haas Co. v. Am. Cyanamid Co.*, 187 F. Supp.2d 221 (D.N.J. 2001) (compiling cases where conflict was waived).
[57] Model Rule 1.7 cmt. 22; Restatement (Third) of Law Governing Lawyers, §122 cmt. (c)(i) (2000).
[58] *See Daniels v. State*, 17 P.3d 75 (Alaska Ct. App. 2001); *McPhearson v. Michaels Co.*, 117 Cal. Rptr.2d 489 (Cal. Ct. App. 2002).
[59] Model Rule 1.9 cmt. 6 ("[I]n the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.")
[60] Id. *See, e.g., Hempstead Video, Inc. v. Inc. Vill. of Valley Stream*, 409 F.3d 127 (2d Cir. 2005) (noting "strong trend" toward allowing presumption of confidence-sharing within firm to be rebutted); *In re ProEducation Int'l, Inc.*, 587 F.3d 296 (5th Cir. 2009) (representation permitted where lawyer had not personally gained information about creditor represented by

that the lawyer was a managing lawyer at the former firm who signed a high volume of G-28s despite limited involvement in the cases themselves.

"Using" Information vs. "Revealing" Information

Lawyers are permitted to ***use*** information from a former representation to the disadvantage of the former client either if another Rule would permit or require it, or if the information is generally known; but they are permitted to ***reveal*** the information only if another Rule would permit or require that disclosure. Two questions arise from these exceptions to confidentiality protections for former clients: (1) when do other Rules permit or require use or disclosure of information; and, (2) when does information become generally known?

The Rules generally cited as permitting or requiring the disclosure of information from a prior representation are 1.6, 3.3, and 4.1.[61] MR 1.6 allows disclosure when impliedly authorized; when a client provides informed consent; and to the extent the lawyer reasonably believes necessary to handle a variety of specific acute situations, such as to prevent reasonably certain death or serious physical harm, or to secure legal advice about the lawyer's compliance with ethical rules.[62] MR 3.3 requires disclosure where necessary to remediate the presentation of false material evidence by the lawyer, the lawyer's client, or a witness called by the lawyer; as well as where necessary to remediate a situation where the lawyer knows a person intends to engage in criminal or fraudulent conduct related to the proceeding.[63] Further MR 4.1 requires a lawyer to disclose a material fact where necessary to avoid assisting a criminal or fraudulent act by a client, subject to prohibited disclosures under MR 1.6.[64]

The question of when information becomes "generally known" is not addressed in MR 1.9, nor in its comments, and perhaps as a result there is not much consensus on how to define the term. A recent ABA opinion, for example, considers information to be "generally known" only if the information has become "widely recognized by members of the public in the relevant geographic area; or… widely recognized in the former client's industry, profession, or trade."[65] The opinion continues, "[i]nformation is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information."[66] The Restatement, however, considers information that is easily accessible to the public through public libraries, government offices, or publicly accessible electronic-data storage, to be "generally known."[67] Courts tend to deem filings not "generally known" even when available to the public, because they are not "within basic understanding

former firm); *Hermann v. GutterGuard Inc.*, 199 F. App'x 745 (11th Cir. 2006) (disqualifying partner who monitored meetings of firm lawyers representing clients in employment matters and who attended meeting in which confidential information of former client discussed).

[61] A number of states explicitly list the rules that may permit or require disclosure in their variation of the Model Rules; these three are almost invariably the ones that are specifically cited.

[62] MR 1.6.

[63] MR 3.3(a) and (b). The duration of the 3.3 "candor" requirements, however, only extends through the time when the time for review of the final judgement has passed. MR 3.3 cmt 13.

[64] MR 4.1.

[65] ABA Formal Op. 479 (12/15/17).

[66] Id.

[67] Restatement (Third) of Law Governing Lawyers, §59 cmt. (d) (2000). In contrast, information is not generally known where obtaining it requires special knowledge or substantial effort. Id.

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and knowledge of the public";[68] but prior convictions have been deemed public because they are a "matter of public record."[69]

Former Government Lawyer

Immigration law involves a wide array of government agencies. There are therefore naturally many instances where former government lawyers subsequently begin practices representing individuals before those agencies, or against those agencies. Conflicts for those lawyers formerly employed by the government, either as a lawyer or in another capacity, are governed by MR 1.11.[70] There are three aspects of MR 1.11 which apply to protections for the "former client," which in this case is the government.[71] First, MR 1.11(a) disqualifies a lawyer formerly employed by the government from handling a matter where the lawyer had personal and substantial participation in that same matter, not merely actual representation in the same or a substantially related matter. Second, MR 1.11(a) makes the lawyer subject to MR 1.9(c)'s rules on confidential information. Third, MR 1.11(c) prohibits a lawyer from representing a client if the lawyer possesses "confidential government information" about another person, where the client and that person have adverse interests in the matter and the information could be used to the material disadvantage of the person. "Confidential government information" is narrowly defined as information that "has been obtained under governmental authority and which… the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public."[72]

Legal Services and Non-Profit Organizations

Many individuals involved in immigration-related legal matters are represented by legal services and non-profit organizations. Because there is no right to counsel in immigration proceedings, these organizations often are the only lawyers available to ensure that indigent immigrant clients can access immigration relief for which they are eligible, and to compel government agencies to meet their evidentiary burdens where they are seeking removals or other negative outcomes for immigrant litigants. If a lawyer working under the umbrella of such an organization, or a program sponsored by a court, is providing "short-term" legal services, she is subject to current and former client conflict rules only if she knows that the representation of the new client involves a conflict of interest.[73]

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[68] *See, e.g., Pallon v. Roggio*, 2006 WL 2466854 (D.N.J. Aug. 24 2006)("'Generally known' does not only mean that the information is of public record. The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information 'generally known' within the meaning of Rule 1.9(c).") (citations omitted); *Turner v. Commonwealth*, 726 S.E.2d 325 (Va. 2012) (Lemons, J., concurring) ("While testimony in a court proceeding may become a matter of public record even in a court denominated as a 'court not of record,' and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'").

[69] *State v. Mancilla*, 2007 WL 2034241 (Minn. Ct. App. July 17, 2007) (prior convictions are "generally known" and can be used by lawyer to cross-examine former clients because they are matters of public record).

[70] MR 1.12 covers conflict guidelines for former judges, arbitrators, mediators, or third-party neutrals.

[71] If the lawyer continues to work for the government, then all aspects of Rule 1.9 apply to the lawyer's former clients. MR 1.11(d)(1).

[72] MR 1.11(c).

[73] MR 6.5(a)(1). Short-term representation includes legal-advice hotlines, advice-only clinics, or pro se counseling programs. Id. at cmt. 1. The representation must be "without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." Id.

D. Hypotheticals

Hypothetical One: Substantial Relationship and Generally Known Information

Smith, an immigration lawyer, represented Sarah, a U.S. citizen, and Gil, a foreign national, with their adjustment of status case. When Smith asked Gil if he had ever been arrested or charged with a crime, Gil said that he had once been charged with Criminal Domestic Violence (CDV), but the charges were later dropped. Smith filed the adjustment case and Gil became a permanent resident at the interview, getting his passport stamped. Once Gil's green card arrived in the mail, Smith sent a letter to the couple with advice to Gil on maintaining his permanent residence and welcoming the couple to return to her firm for future immigration matters, including Gil's naturalization.

A year later, Michelle, a prospective new client, is having a consultation with Smith. Her stated purpose for the consultation is to determine what, if any, immigration options might be available to her. Smith reviews her standard questionnaire with Michelle and asks if she has ever been the victim of a crime. Michelle describes how she was abused for years by her boyfriend, Gil. Smith asks if she ever called the police. Michelle says that she called the police just once and Gil was arrested and charged with CDV. Smith asks if she cooperated with the police, and Michelle confirms that she assisted the police in every way possible. Smith then asks for Gil's complete name and runs a conflict of interest check. She discovers a perfect match with her former client whom she assisted a year ago. Smith has not had nearly enough business this year and would like to accept the case if ethically permitted to do so.

Analysis

Unfortunately for Smith, she cannot take Michelle's case unless she gets informed consent from Gil, confirmed in writing.

Current or former client?

The first question is whether Gil is a current client or former client. If Gil is still a current client, then the more restrictive conflict provisions of MR 1.7 will apply. Here, because the matter for which Smith was originally retained – Gil's adjustment of status – was resolved, Gil will likely be considered a former client. The letter that Smith sent is somewhat problematic because it does not clearly indicate the representation has terminated. Looking at it through the eyes of a client, though, it will more likely be construed as an invitation to return for representation on the separate matter of naturalization than as an indication of ongoing representation. A more prudent letter, however, would make it much clearer that the representation is over, but that Gil can contact Smith in the future to discuss establishing a new lawyer-client relationship on a new matter.

Substantially related matters?

Given that this is a former client conflict situation, the first issue is whether the former representation of Gil is substantially related to the potential representation of Michelle. The likely scope of the legal work here on behalf of Michelle will involve determining the feasibility of pursuing a U-Visa and then pursuing that form of relief if viable. That U-Visa assessment involves determining, among other things, whether Michelle cooperated with the investigation or prosecution of certain crimes; here, that would involve looking at Michelle's assistance to police on the domestic violence allegations against Gil. Gil's adjustment of status and Michelle's U-Visa are clearly not the ***same*** matter, but to determine if they are substantially related requires asking whether confidential information that would normally have been obtained in the prior representation of Gil would materially advance Michelle's position. Here, the answer to that question is probably yes, given how much information any responsible immigration lawyer would normally obtain about a client's former CDV matters for an adjustment of status application. If Smith obtained information from Gil about the underlying incidents, then the information Smith

learned could easily materially advance Michelle's U-Visa claim by providing necessary information to establish the elements of U-Visa eligibility.

As to material adversity of interests, would Michelle providing information to USCIS about Gil and the CDV matter adversely affect Gil? Potentially, yes. Even though the charges were dropped, any qualifying admission made by Gil during the course of the CDV matter could affect his naturalization application.

But what if that information is "generally known?"

In some jurisdictions, if information has become generally known, then the fact that it would advance a new client's position does not render the former matter and current matter "substantially related." In other words, if the information Smith learned about Gil's CDV matter is "generally known," then there is no prohibitive substantial relationship between his adjustment of status case and Michelle's U-Visa case. Typically, courts will not utilize this exception where they believe that MR 1.9's purpose is to ensure loyalty to former clients beyond merely protecting confidential information. Those courts will determine that the more general duty of loyalty to the former client does not disappear merely due to the fact that information is no longer confidential.[74] Here, though, even in a court which followed the "generally known" exception, it is unlikely to apply. The information is not "widely recognized by members of the public in the relevant geographic area; or… widely recognized in the former client's industry, profession, or trade."[75] In addition, there is probably very little information about the CDV case that is publicly accessible given that the charges were dropped.[76]

Even if Smith could take Michelle's case, could she use any information learned while representing Gil on behalf of Michelle?

There are two possible grounds that allow the use of confidential information of a former client to that former client's disadvantage, and neither applies here. First, if the information has become generally known, it can be used. Prior convictions, for example, are likely to be considered a matter of public record. As discussed above, though, where the case was dismissed, the items that are truly available to the public may not be much, especially if the case was sealed. Second, Smith could use the information gained in representing Gil if the information is not used to Gil's detriment. As discussed above, the information might indeed inure to his disadvantage in a naturalization application. Consequently, neither situation applies, and absent informed consent from Gil, Smith would not be able to use any information learned in representing Gil on behalf of Michelle.

Hypothetical Two: Robot Wars and Material Adversity

Edge Self-Driving Auto Solutions, a robotics technology start-up, hires Smith, an immigration attorney, to help secure H-1B status for its intern, John. Smith is successful, and John makes it through the H-1B "lottery" and secures H-1B status as an employee of Edge. After Smith sends Edge the H-1B approval notice and an end-of-representation letter, Edge calls Smith and asks over the phone that Smith help John obtain lawful permanent resident status through the employment-based process, with Edge as the employer-sponsor. Smith agrees and emails a new retainer agreement to Edge. Two months go by, and Smith hears nothing back from Edge.

[74] *See Robertson v. Wittenmyer*, 736 N.E.2d 804 (Ind. Ct. App. 2000); *Centerline Indus. Inc. v. Knize*, 894 S.W.2d 874 (Tex. App. 1995); *see also* Maryland Ethics Op. 02-10 (2001) (no "generally known" exception to Rule 1.9 because that rule concerns obligation of loyalty to former clients).
[75] *See* ABA Formal Op. 479 (12/15/17).
[76] Even if the information were easily accessible, ABA Formal Op. 479 states that "[i]nformation is not 'generally known' simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information." Id.

Three months after John has secured H-1B status, he contacts Smith. John tells Smith that the culture at Edge is stifling, that Edge may be on the brink of bankruptcy, and that he has developed a game-changing technology—similar to one being sold by Edge but far better—that could have an enormous impact on the self-driving car industry. John has been approached by an angel investor, who is willing to provide John with substantial funds to start a separate business selling this new technology. The angel investor has offered to set up the new business, which could then sponsor John as an H-1B employee. John also tells Smith that he has an uncle who has offered to gift John substantial funds, which John could potentially then use to eventually obtain E-2 status as a treaty-investor. Either way, John wants to hire Smith to secure the appropriate nonimmigrant classification. Can Smith take the case?

Analysis

No, unless he gets informed consent, confirmed in writing, from Edge.

Does the unsigned retainer matter?

As always, when assessing a client conflict issue, the first question is whether or not Edge is a former or current client. Here, because the retainer was never signed and returned to Smith, Edge would likely be considered a former client. That conclusion will, however, also depend on past practices between Smith and Edge. If the lag time between sending out retainers and having it signed in this lawyer-client relationship is typically a few months, or if Smith has an ongoing general retainer with Edge, then Edge could be considered a current client, and the much more restrictive concurrent client conflict rules of MR 1.7 will apply. Best practices here would be for Smith to send a letter to Edge clarifying the status of her lawyer-client relationship with them regarding the prospective representation.

Confidential information that materially advances position equals substantial relationship

Assuming that Edge has former client status, the next question is whether the two matters (representing Edge for purposes of securing H-1B status to work at Edge, and representing John to obtain H-1B or E-2 status to work for the angel investor) are the same or substantially related.

To determine if the matters are substantially related, the key question again is whether confidential information that would normally have been obtained in the prior representation would materially advance the prospective client's position. Here, that will depend on the nature of the information acquired in the initial petition, and the nature of the prospective matter – here an H-1B petition or an E-2 application. For the H-1B case where Smith represented Edge, she will have looked into the nature of expertise, duties, and knowledge required for the position, including some level of scrutiny of John's level of expertise. All of that information is confidential because it was obtained in the course of representing Edge. For the H-1B petition on behalf of Smith with the angel investor, because it is the same type of expertise and technology, then confidential information about Edge's technology could advance Smith's claim of expertise. For the E-2 application, the answer is the same, but for different reasons – using the confidential information from Edge could advance John's claims to show his degree of proven expertise, and the viability of the E-2 enterprise.

What makes interests "materially adverse?"

But even if the matters are substantially related, there is still no conflict unless the interests of Edge and John are materially adverse. Here, they are. Material adversity generally breaks down into two categories: situations where the current and former clients are opponents in litigation or on opposite sides of a transaction, and situations where the former client, though not involved in the litigation or transaction as a party, may be adversely affected by it. This is not the former situation; it is, however, the latter. To assess adverse effects, courts conduct factual

inquiries to determine the likelihood, and extent, of any potential legal, financial or other identifiable harm to the former client. Those harms even include the possibility that the current representation will require the former client to incur legal expenses. Here, John's development of technology could potentially push Edge to bankruptcy. Generally, merely being a "competitor" of a former client is not enough to create material adversity; but the real possibility of the extreme consequence of bankruptcy would make the interests materially adverse. Note that if the new client is not John, but rather the new company, then it is even more likely that the interests are materially adverse. Of course, the question of "material adversity" need only be reached if the matters are substantially related. If the matters are not substantially related, then the economic hardship to a former client will not preclude representation of the current client.

Hypothetical Three: Open-Ended Representation and the Hot Potato Gambit

On their first wedding anniversary, Nancy Newhouse and her U.S. citizen husband, Max, hire Imelda to file an application for adjustment of status based on their marriage. The retainer agreement specifies, in part, that "attorney will prepare and file an I-130/I-485, Application for Conditional Permanent Resident status." The case is approved and Nancy's permanent resident card arrives in the mail. To Nancy and Max's surprise, the card carries a 10-year expiration date. Perplexed, they call Imelda to ask why Nancy received a 10-year, rather than a 2-year card, and whether they should bring it to USCIS' attention. Imelda says "No need - if the government makes a mistake they can't hold it against you." Imelda notifies Nancy and Max that she will keep their file on "active" status at the firm and not close the case in the event any issues arise from the mistake on the card.

Imelda is also representing Inocente, Nancy's 19-year-old son, in his naturalization application. About six months after Nancy receives her permanent resident card, Inocente requests a meeting with Imelda at her office. Inocente tells Imelda that a fraud investigator stopped by his school to ask him a few questions about his living situation, whether he had roommates, etc. He declined to answer the investigator's questions. The investigator told him he might want to consider hiring a criminal defense attorney. Inocente tells Imelda that he thinks the problem might have to do with his mother's marriage. He shows Imelda a copy of a Notice to Appear and Notice of Intent to Rescind the LPR status that had been sent to his mother. Inocente tells Imelda that he thinks his mother and her husband may have submitted false information in the I-130 / I-485 application. Imelda decides that she does not want any part of representing Nancy, and sends a letter formally terminating the representation. She does, however, wish to continue representing Inocente *pro bono*. Inocente is only 19 and Imelda thinks he would not be able to afford his own lawyer. Can Imelda continue to represent Inocente?

Analysis

No, unless she gets informed consent, confirmed in writing, from Nancy.

The perils of open-ended representation

Imelda's letter to Nancy that she will keep her file on "active" status at the firm and not close the case creates an open-ended representation that ensures that Nancy will be a current client until subsequent action is taken to terminate the representation. As with many lawyers who work with families in immigration matters, Imelda is very generously offering to continue to assist a client who may have some issues or representational needs down the line that, although not covered by the original retainer, relate to the original scope of representation. The problem here is that, by keeping Nancy as a current client to help her with any problems on her application, not only must Imelda adhere to the more restrictive concurrent client conflict guidelines, but, as we will see, her subsequent actions to terminate that representation will bring closer scrutiny.

Can Imelda turn Nancy into a former client, for conflict purposes, by sending the termination letter?

Courts take a very dim view of the "hot potato gambit," where lawyers terminate a representation so that they can avail themselves of the less restrictive former client conflict rules. If, however, the grounds for the termination do not relate to the conflict, then courts tend to apply former client conflict rules, and the representation of the remaining client is thus more likely to be permitted. Here, if Imelda is withdrawing because of ethical reasons related to candor or other similar issues, then the termination will likely not be considered a "hot potato gambit," and former client conflict rules, rather than concurrent client conflict rules, will apply. But if the primary purpose of the withdrawal is so the conflict will fall under the more permissive rules of MR 1.9 former clients, then courts will very likely apply the concurrent client conflict rules of MR 1.7.

If Nancy Is a former client, can Imelda represent Inocente?

Even if Imelda properly withdrew from representing Nancy, which makes this a 1.9 former client conflict situation, here the matters are substantially related because Inocente is potentially tied into the fraud, and material adversity of interests is likely. Only with the informed consent of Nancy can Imelda continue representing Inocente. Informed consent from Nancy would involve providing a thorough explanation of the risks and potential negative consequences of Imelda representing Inocente, including the possible use of negative information about Nancy to help protect Inocente from adverse immigration consequences.

Hypothetical Four: Loyalty to the Former Client of the Former Firm

Years ago, Smith started her immigration law practice as an associate with a mid-sized immigration boutique. While an associate there, she attended part of a lunch presentation at the firm given by a senior partner on how some H-1B employers were able to legally maximize their profits by depressing H-1B salaries. The first part of the talk covered the employers' judicious use of alternative wage surveys when filing labor conditions applications instead of the prevailing wage figures published by the Department of Labor. One such employer, Specialty VR Systems, was a client of Smith's firm. Smith left the talk before the second half of the presentation.

Three years later, Smith quit the mid-sized immigration boutique and started her own practice. Shortly after doing so, she finds herself holding a meeting with three foreign nationals, all of whom are H-1B employees who work on the same R&D team at Specialty VR Systems. They tell Smith that they would like her to help them explore options for seeking redress from the company as, over the past year, they have been periodically placed by their employer on the "unproductive bench" with only half of their pay. They have also been hearing about, and want to explore, other "questionable salary issues." Can Smith take the case?

Analysis

Yes, depending on how limited the information is that she learned about Specialty VR Systems while she was at the former firm.

Former client of former firm

MR 1.9(b) addresses conflicts with former clients of the lawyer's former firm. The analysis involves three questions:

> (1) Is the current / prospective client's matter the same or substantially related to the former client's matter? *If not, there is no prohibitive conflict.*
> (2) If the matters are the same or substantially related, are the interests of the current/prospective client and the former client materially adverse? *If not, there is no prohibitive conflict.*

(3) If the matters are the same or substantially related, and the interests are materially adverse, did the lawyer acquire material confidential information about the former client? *If not, then even if the matters are the same or substantially related, and the interests of the person and the former client are materially adverse, then there is no prohibitive conflict.*

Here, the matters are clearly substantially related, since confidential information that Smith's former firm has about Specialty VR Systems strategies could be used against them in litigation by employees. In addition, the interests of Specialty VR Systems and the employees are obviously materially adverse in an action brought by the employees against their employer. The sole question then is whether Smith learned confidential information at the lunchtime lecture at her firm that is material to the possible representation of the employees. If she learned information at the lecture about Specialty VR practices that are at issue in the new case, or even relevant to the new case, and it was conveyed that Specialty VR was using those practices, then Smith acquired material, confidential information. Note that the question is only whether ***Smith*** had confidential information about the representation of Specialty VR that was material, not whether ***anyone at Smith's prior firm*** had that information. Here, it seems very unlikely that Smith acquired such material information that was connected to Specialty VR in the lunchtime talk. If that was the only information Smith acquired about the representation of Specialty VR, then she would be permitted to represent the employees.

And, how could she prove this?

If Specialty VR contested Smith's representation of the employees, alleging that Smith has a conflict of interest, the burden would be on Smith to show that she did not acquire material, confidential information. She could show this in a number of ways – by showing she worked in a different part of the firm; or that she had no access to the files; or that she never participated in firm discussions about the case.

What if Smith heard about sketchy practices of Specialty VR outside of her former firm?

For example, what if, while still employed at her former firm, Smith were at an AILA conference and heard other lawyers talking about Specialty VR's practices? Clearly, due to general client loyalty considerations, Smith could not share this information while she was still employed at her former firm. If the information relates to the representation of Specialty VR, and is material to the matter, then even when Smith leaves the firm, she has a conflict under MR 1.9(b) that requires informed consent of Specialty VR, confirmed in writing. If, however, the overheard information does not relate to the representation of Specialty VR by Smith's former firm, or it is not material to that representation, then she can proceed with the representation of the employees.

E. Summary of State Variations of Model Rule 1.9

Twenty-four states have adopted MR 1.9 verbatim.[77] Twenty-six states and Washington D.C. have variations on MR 1.9.[78] The two most common variations involve the requirements surrounding informed consent and protected information. Fifteen states[79] and Washington D.C. change one or more of the following regarding the attainment of "informed consent" from former clients: the type of consent required, the parties whose consent is

[77] Arkansas, Colorado, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, and West Virginia.

[78] Alabama, Alaska, Arizona, California, Florida, Georgia, Hawaii, Illinois, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Wisconsin, Wyoming, and Washington D.C.

[79] Alabama, California, Florida, Hawaii, Illinois, Michigan, Mississippi, New Jersey, North Dakota, Oregon, Pennsylvania, Texas, Virginia, Wisconsin, and Wyoming. *See infra* at 4-10.

required, and whether such consent needs to be written (i.e. signed by the former client) or confirmed in writing. Eight states[80] limit prohibitions on disclosure of information gained during the course of the former representation to a more specific category of "confidential information," as opposed to general information acquired in connection with the previous representation. The remaining states have adopted variations aside from the two categories enumerated above.[81]

States that Have Informed Consent Variations

Alabama

Alabama does not require informed consent in writing, but requires a lawyer to obtain a client's consent after consultation. Alabama also does not have MR 1.9(b) or 1.9(c)(2).[82]

California

California has adopted new Rules of Professional Conduct, including a new Rule 1.9 that is substantially identical to the Model Rule. The new California Rules take effect on November 1, 2018. California's current rule differs from MR 1.9 in several ways.[83] The current rule explicitly outlines what type of information a lawyer must provide to the former client – a written disclosure of "relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." Second, it broadens the scope of the type of relationship that would require a lawyer to make such disclosures. Unlike the Model Rule, which addresses an attorney-client relationship, California's rule applies when a lawyer has had a "legal, business, financial, professional, or personal relationship" with the client, and knew or should have known of a relationship that would substantially affect their representation; or if the member has had one of the above relationships with another person or entity that would be affected substantially by resolution of the matter, or if the lawyer had such an interest in the subject matter of the representation. California Rule 3-310(e) is similar to MR 1.9(c), but is broader in scope, stating that a member may not accept employment adverse to the client or former client where the member acquired confidential information material to the employment, unless the member has informed written consent.

Washington D.C.

Washington D.C. does not require informed consent to be confirmed in writing and does not contain provisions mirroring MR 1.9(b) or (c). However, Rules 1.6(g), 1.10, and 1.11 encompass the removed sections.[84]

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[80] Alaska, California, Maine, Massachusetts, New York, Texas, Virginia, and Wyoming. *See infra* at 11-13.

[81] *See infra* at 13-17.

[82] **Rule 1.9–Conflict of Interest: Former Client (Alabama)**
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client, unless the former client consents after consultation; or
(b) Use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.

[83] The new California Rules are available at the State Bar of California website. The current rule regarding informed consent is as follows:
Rule 3-310–Avoiding the Representation of Adverse Interests (California)
(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

[84] **Rule 1.9-Conflict of Interest: Former Client (Washington D.C.)**

Florida

Florida does not include a requirement of confirmation in writing, though the consent still needs to be "informed." Florida also does not adopt MR 1.9(b). [85]

Hawaii

Hawaii changes the requirement for "informed consent, confirmed in writing" into "consents after consultation, and confirms in writing."[86]

Illinois

Illinois does not require informed consent to be confirmed in writing.[87]

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

[85] **Rule 4-1.9–Conflict of Interest: Former Client (Florida)**
A lawyer who has formerly represented a client in a matter must not afterwards:
(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;
(b) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or
(c) reveal information relating to the representation except as these rules would permit or require with respect to a client.

[86] **Rule 1.9-Conflict of Interest: Former Client (Hawaii)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation, and confirms in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents after consultation, and confirms in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[87] **Rule 1.9 Duties to Former Clients (Illinois)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

Michigan

Michigan does not require informed consent confirmed in writing; instead it requires "consent after consultation."[88]

Mississippi

Mississippi does not require informed consent confirmed in writing; instead it requires "consent[] after consultation." Mississippi also does not adopt requirements in MR 1.9(b) or (c)(2). Mississippi does make minor changes to the language that do not substantively change the rule's requirements.[89]

New Jersey

New Jersey requires informed consent from a former client of a lawyer's former firm only where the lawyer personally acquired confidential information material to the matter, but forbids a representation entirely where a lawyer had sole or primary responsibility for the matter involving the former client at their previous firm. New Jersey also adds that "[a] public entity cannot consent to a representation otherwise prohibited by this Rule."[90]

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(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[88] **Rule 1.9-Conflict of Interest: Former Client (Michigan)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
(b) Unless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client
(1) whose interests are materially adverse to that person, and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

[89] **Rule 1.9-Conflict of Interest: Former Client (Mississippi)**
A lawyer who has formerly represented a client in a matter shall not thereafter:
(a) represent another in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or
(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known.

[90] **Rule RPC 1.9-Duties to Former Clients (New Jersey)**
(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing. Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client

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North Dakota

North Dakota's requires written consent (as opposed to "informed consent, confirmed in writing"). North Dakota also prohibits a lawyer from using information relating to the representation of a former client to that client's disadvantage in "the same or a substantially related matter" (as opposed to using it to the client's "disadvantage") except as otherwise stated.[91]

Oregon

Oregon's rule requires informed consent in writing from all affected clients (as opposed to only the former client). Oregon also adds a definition of "substantially related," in Section (d)(1): "the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client."[92]

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nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

[91] **Rule 1.9-Duties to Former Client (North Dakota)**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client consents in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client in the same or a substantially related matter except as these Rules would require or permit with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[92] **Rule 1.9-Duties to Former Clients (Oregon)**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

Pennsylvania

Pennsylvania does not require that informed consent be confirmed in writing.[93]

Texas

Texas has adopted several variations to its version of MR 1.9. First, Texas requires "prior consent" (as opposed to informed consent, confirmed in writing). Second, Texas adds two scenarios that act as the basis for conflicts between a lawyer and a former client: (1) where the former client questions the lawyer's work during the prior representation; and (2) where representation is reasonably likely to violate Rule 1.05 (Confidentiality of Information). Third, Texas requires that representation be adverse (as opposed to "materially adverse") to a former client in order for a conflict to be prohibitive.[94]

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(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) For purposes of this rule, matters are "substantially related" if (1) the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client; or (2) there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation of the former client would materially advance the current client's position in the subsequent matter.

[93] **Rule 1.9-Duties to Former Clients (Pennsylvania)**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

[94] **Rule 1.9-Conflict of Interest: Former Client (Texas)**

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

(1) in which such other person questions the validity of the lawyer's services or work product for the former client;

(2) if the representation in reasonable probability will involve a violation of Rule 1.05; or

(3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

Virginia

Virginia's rule requires "consent after consultation" of both the former client and the prospective or current client, but such consent does not have to be informed or in writing.[95]

Wisconsin

Wisconsin requires informed, written consent from a former client to be signed by the former client.[96]

Wyoming

Wyoming requires informed, written consent from a former client to be signed by the former client where a lawyer seeks to represent another person in the same matter as the former client. Wyoming also prohibits a lawyer from using or revealing "confidential information" (as opposed to "information") of a former client except as otherwise stated.[97]

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[95] **Rule 1.9-Conflict of Interest: Former Client (Virginia)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless both the present and former client consent after consultation.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
unless both the present and former client consent after consultation.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

[96] **Rule 1.9-Duties to Former Clients (Wisconsin)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in a writing signed by the client.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

[97] **Rule 1.9-Duties to Former Clients (Wyoming)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. For representation of another person in the same matter the former client's informed consent confirmed in writing shall be signed by the client.

States that Have Protected Information Variations

Alaska

Alaska replaces references to "information" with "confidences and secrets" throughout. [98]

California

See supra at fn 83.

Maine

Maine replaces references to "information" with "confidences and secrets" in reference to protected information under MR 1.9(c). [99]

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing. For representation of another person in the same matter, the former client's informed consent confirmed in writing shall be signed by the client.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use confidential information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal confidential information relating to the representation except as these Rules would permit or require with respect to a client.

[98] **Rule 1.9–Duties to Former Clients (Alaska)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use confidences and secrets to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal confidences and secrets except as these Rules would permit or require with respect to a client.

[99] **Rule 1.9-Duties to Former Clients (Maine)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

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Massachusetts

Massachusetts forbids lawyers from using or revealing "confidential information" (as opposed to "information") of a former client unless otherwise stated. Massachusetts also forbids "confidential information" from being used or revealed to the advantage of the lawyer or a third party (in addition to the disadvantage of the former client) and removes MR 1.9's provision allowing lawyers to use information that has become "generally known" to a former client's disadvantage. Massachusetts also explicitly lists Rules 1.6, 3.3, and 4.1 as rules that may require a lawyer to use or reveal "confidential information" in ways otherwise prohibited under Rule 1.9.[100]

New York

New York forbids lawyers from using or revealing "confidential information" (as opposed to "information") of a former client except as otherwise stated.[101]

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidences or secrets of a former client to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal confidences or secrets of a former client except as these Rules would permit or require with respect to a client.

(d) Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

[100] **Rule 1.9-Duties to Former Clients (Massachusetts)**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information relating to the representation to the disadvantage of the former client or for the lawyer's advantage or the advantage of a third person, except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client; or
(2) reveal confidential information relating to the representation except as Rule 1.6, Rule 3.3, or Rule 4.1 would permit or require with respect to a client.

[101] **Rule 1.9-Duties to Former Clients (New York)**

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

Texas

See supra at fn 93.

Wyoming

See supra at fn 96.

States with Additional Variations

Florida

See supra at fn 84.

Georgia

Georgia adds the provision "[t]he maximum penalty for a violation of this Rule is disbarment."[102]

Massachusetts

See supra at fn 99.

Mississippi

See supra at fn 88.

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(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

[102] **Rule 1.9-Conflict of Interest: Former Client (Georgia)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c), that is material to the matter; unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.
The maximum penalty for a violation of this Rule is disbarment.

Nebraska

Nebraska's rule extends coverage of Rule 1.9 to "support persons" associated with a lawyer or law firm, including but not limited to law clerks, paralegals, legal assistants, secretaries, messengers, and other support personnel employed by the law firm.[103]

Oregon

See supra at fn 91.

North Dakota

See supra at fn 90.

Tennessee

Tennessee allows lawyers to use or reveal (as opposed to just use) information related to the representation of a former client to that client's disadvantage if such information is "generally known." Tennessee's rule also allows

[103] **Rule 3-501.9 - Duties to Former Clients (Nebraska)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.
(d) A lawyer shall not knowingly allow a support person to participate or assist in the representation of a current client in the same or a substantially related matter in which another lawyer or firm with which the support person formerly was associated had previously represented a client:
(1) whose interests are materially adverse to the current client; and
(2) about whom the support person has acquired confidential information that is material to the matter, unless the former client gives informed consent, confirmed in writing.
(e) If a support person, who has worked on a matter, is personally prohibited from working on a particular matter under Rule 1.9(d), the lawyer or firm with which that person is presently associated will not be prohibited from representing the current client in that matter if:
(1) the former client gives informed consent, confirmed in writing, or
(2) the support person is screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the support person and the firm have a legal duty to protect.
(f) For purposes of Rules 1.9(d) and (e), a support person shall mean any person, other than a lawyer, who is associated with a lawyer or a law firm and shall include but is not necessarily limited to the following: law clerks, paralegals, legal assistants, secretaries, messengers, and other support personnel employed by the law firm. Whether one is a support person is to be determined by the status of the person at the time of the participation in the representation of the client.

lawyers to use or reveal information related to the representation of a former client to that client's disadvantage if the lawyer obtains the former client's informed, written consent.[104]

Texas

See supra at fn 93.

Chart of Variations by State

State	Variations
Alabama	Informed Consent: Lawyers must obtain a former client's consent "after consultation" and consent does not have to be in writing or confirmed in writing.
Alaska	Protected Information: Lawyers may not use or reveal "confidences and secrets" (as opposed to "information") to the disadvantage of the former client except as otherwise stated.

[104] **Rule 1.9-Duties to Former Clients (Tennessee)**
(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by RPCs 1.6 and 1.9(c) that is material to the matter.
(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter reveal information relating to the representation or use such information to the disadvantage of the former client unless (1) the former client gives informed consent, confirmed in writing, or (2) these Rules would permit or require the lawyer to do so with respect to a client, or (3) the information has become generally known.

State	Variations
California[105]	Informed Consent: All informed consent must be written following written disclosure. Former Client of Former Firm: No provisions regarding how a lawyer's former or present firm's representation of a client might affect the lawyer's duties with respect to that client. But, if a lawyer has obtained confidential information material to the employment of another client, then the lawyer must obtain the former client's informed consent before accepting employment adverse to that client. California Rule 3-100 governs confidential information of a client, but does not explicitly apply to former clients. Substantial Relationship of Matters: Subsequent representation does not have to be the same or substantially related to a former matter in order to require informed consent from a former client. Adversity of Interests: Subsequent representation that is "adverse" (as opposed to "materially adverse") triggers requirement for informed consent from former client.
District of Columbia	Informed Consent: Informed consent does not have to be in writing or later confirmed in writing. Former Client of Former Firm: Does not include provisions regarding how a lawyer's former firm's representation of a client might affect the lawyer's ability to represent other clients. However, Comment 5 directs lawyers to Rule 1.10 "Imputed Disqualification: General Rule" for discussion of disqualification based on the lawyer's former or present firms and to Rule 1.11 for discussion of disqualification for former judges and law clerks. Similarly, Comment 4 directs lawyers to Rule 1.11 "Successive Government and Private Employment" for discussion of disqualification based on successive government and/or private employment. D.C. Rule 1.6(g) and Comment 10 to that rule address how lawyers must treat a former client's information.
Florida	Informed Consent: Does not require informed consent to be in writing or confirmed in writing. Former Client of Former Firm: Does not include provisions regarding how a lawyer's former firm's representation of a client might affect the lawyer's ability to represent other clients.

[105] The variations noted here are contained in the California rule in effect at the time this chapter was written. However, California has adopted new Rules of Professional Conduct, including a new Rule 1.9 that is substantially identical to the Model Rule. The new California Rules take effect on November 1, 2018. *See supra* fn 83 and accompanying text.

State	Variations
Georgia	Georgia adds "[t]he maximum penalty for a violation of this Rule is disbarment."
Hawaii	Informed Consent: Lawyers must obtain a former client's consent "after consultation" and consent must be confirmed in writing.
Illinois	Informed Consent: Informed consent does not have to be in writing or later confirmed in writing.
Maine	Protected Information: Lawyers may not use or reveal "confidences and secrets" (as opposed to "information") to the disadvantage of a former client except as otherwise stated.
Massachusetts	Protected Information: Lawyers may not use or reveal "confidential information" (as opposed to "information") of a former client except as otherwise stated. Grounds for Using or Revealing Confidential Information: Explicitly lists Rule 1.6, Rule 3.3, and Rule 4.1 as rules that may require a lawyer to use or reveal "confidential information" in ways otherwise prohibited under Rule 1.9. Explicitly states that a former client's "confidential information" cannot be used or revealed to the advantage of the lawyer or a third-party or to disadvantage the former client.
Michigan	Informed Consent: Lawyers must obtain a former client's consent "after consultation" and consent does not have to be in writing or confirmed in writing.
Minnesota	Former Client of Former Firm: Prohibits lawyers who have acquired information protected by Rules 1.6 and 1.9(c) (as opposed to information "material to the matter") from representing future clients under the same circumstances outlined in the Model Rule.

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State	Variations
Mississippi	Informed Consent: Lawyers must obtain a former client's consent "after consultation" and consent does not have to be in writing or confirmed in writing. Former Client of Former Firm: Does not include provisions regarding how a lawyer's former firm's representation of a client might affect the lawyer's ability to represent other clients. Mississippi Rule 1.6 "Confidentiality of Information" outlines the circumstances where a lawyer may or may not reveal information. According to the final comment in the commentary, "The duty of confidentiality continues after the client-lawyer relationship has terminated."
Nebraska	Covered Persons: Extends coverage of Rule 1.9 to "support persons" associated with a lawyer or law firm, including but not limited to law clerks, paralegals, legal assistants, secretaries, messengers, and other support personnel employed by the law firm.
New Jersey	Informed Consent: Requires informed consent from a former client of a lawyer's former firm only where the lawyer personally acquired confidential information material to the matter. Forbids representation entirely where a lawyer had sole or primary responsibility for the matter involving the former client at their previous firm. Note: Rules do not appear to define "public entity."
New York	Protected Information: Lawyers may not use or reveal "confidential information" (as opposed to "information") of a former client except as otherwise stated.
North Dakota	Informed Consent: Requires written consent (as opposed to "informed consent, confirmed in writing"). Grounds for Using or Revealing Information: Prohibits a lawyer from using information relating to the representation of a former client to that client's disadvantage in "the same or a substantially related matter" (as opposed to using it to the client's "disadvantage") except as otherwise stated.

State	Variations
Oregon	Informed Consent: Requires informed consent in writing from all affected clients (as opposed to only the former client). Substantial Relationship of Matters: Requires informed consent in writing from a former client if "the lawyer's representation of the current client will injure or damage the former client in connection with the same transaction or legal dispute in which the lawyer previously represented the former client."
Pennsylvania	Informed Consent: Requires informed consent, but such consent does not need to be confirmed in writing.
Tennessee	Grounds for Using or Revealing Information: Allows lawyers to use or reveal (as opposed to just use) information related to the representation of a former client to that client's disadvantage if such information is "generally known." Allows lawyers to use or reveal information related to the representation of a former client to that client's disadvantage if the lawyer obtains the former client's informed, written consent.
Texas	Informed Consent: Requires "prior consent" (as opposed to informed consent, confirmed in writing). Basis for Conflicts: Adds two scenarios that act as the basis for conflicts between a lawyer and a former client: (1) where the former client questions the lawyer's work during the prior representation; and (2) where representation is reasonably likely to violate Rule 1.05 (Confidentiality of Information). Adversity of Interests: Requires that representation be "materially" adverse (as opposed to just "adverse") to a former client. Protected Information: Texas Rule 1.05 applies to former clients.
Virginia	Informed Consent: Requires "consent after consultation" of both the former client and the prospective client, but such consent does not have to be informed or in writing. Protected Information: Prohibits lawyer from using information gained during the course of representing (in addition to information related to the representation of) a former client to that client's disadvantage.
Wisconsin	Informed Consent: Requires informed, written consent from a former client to be signed by the former client.

State	Variations
Wyoming	Informed Consent: Requires informed, written consent from a former client to be signed by the former client. Requires such consent where a lawyer seeks to represent another person in the same matter as the former client. Protected Information: Prohibits lawyer from using or revealing "confidential information" (as opposed to "information") of a former client, except as otherwise stated.

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This chapter of the AILA Ethics Compendium is written by Theo Liebmann and reviewed and produced by the 2017-18 AILA National Ethics Committee (Alan Goldfarb, Chair and Kenneth Craig Dobson, Vice Chair) and the AILA Practice & Professionalism Center.

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American Immigration Lawyers Association

AILA ETHICS COMPENDIUM

ABA MODEL RULE 1.14
CLIENT WITH DIMINISHED CAPACITY

Sherry K. Cohen, Reporter

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MODEL RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

Introduction

Most experienced lawyers know that working with clients can present challenges that go well beyond competency, diligence or any other ethical obligation. Fundamental to any attorney-client relationship is the ability of the client to participate in the relationship in a meaningful way through, among other things, adequate communication and discussion with the lawyer. The client should, presumably with the lawyer's assistance, be capable of understanding the legal and factual issues pertaining to the representation, understanding the decision making process and ultimately being capable of making decisions relating to the objective of the representation to be carried out by the lawyer. This generally requires that clients have the communication skills, intellectual capacity and emotional intelligence to participate in the attorney-client relationship in a meaningful way. But sometimes this is not the case.

Immigration lawyers, and those practicing in others areas, may find themselves representing a client who for reasons of minority (*e.g.*, a child), mental impairment (*e.g.*, dementia or mental retardation) or other impairment (*e.g.*, substance abuse) lacks the capacity to make informed and reasoned decisions or otherwise assist the lawyer in the representation. Since a lawyer is required to abide by a client's decisions concerning the objectives of representation and consult with the client about the means to accomplish the objectives of the representation,[1] a lawyer may find himself in a very difficult place if his client's capacity to do the above is diminished.

What should the lawyer do?

- As a general matter, is the lawyer obligated to abide by the wishes of the client even though the lawyer reasonably believes the client is incapable of making decisions that affect his well-being?
- May the lawyer ethically withdraw when it is apparent that another lawyer will have the same problem?
- May the lawyer confer with her minor client's closest relative to decide what legal strategies to pursue?
- When decisions must be made, may the lawyer substitute her own judgment for that of the client?
- May the lawyer reach out to doctors or other health professionals for assistance or advice in interacting with the client, even if it entails the disclosure of confidential information?
- If the lawyer decides that the client needs a guardian ad litem or guardian, may the lawyer represent the proposed guardian in family court?
- May a lawyer seek the appointment of a legal representative of the client without consent of the client?
- May the lawyer serve as guardian and represent the impaired client at the same time?
- If the lawyer learns that a client with diminished capacity has suicidal thoughts, is the lawyer obligated to disclose that information to the appropriate authorities? Does the lawyer have the option of disclosing such information?

[1] *See* MR 1.2(a) and MR 1.4.

- If the lawyer learns that a client with diminished capacity is being abused by a relative but directs the lawyer not to disclose that information for fear of further abuse, is the lawyer obligated to disclose that information to the appropriate authorities? Does the lawyer have the option of disclosing such information?

Lawyers seeking the answers to these questions should be aware of MR 1.14, which addresses the representation of clients with diminished capacity. Indeed, all lawyers should be familiar with the rule even if they only rarely represent clients with diminished capacity, not only to avoid potential discipline but also to better serve their client's interests. Lawyers who do pro bono work and those who supervise pro bono lawyers must be particularly sensitive to issues involving a client's capacity.[2]

The first section of MR 1.14 provides that that even when the client has diminished capacity, the lawyer is obligated to maintain as far as reasonably possible a "normal client-lawyer relationship."[3] To that end, the lawyer must still comply with other applicable rules of professional responsibility, in particular, the duty of adequate communication under MR 1.4. This may include developing special communication skills and enlisting family members to help communicate.

The second section of MR 1.14 provides guidance to the lawyer who has done her best to maintain a normal client-lawyer relationship, but still is not sure whether her client is competent to make decisions on her own behalf. In particular, if the lawyer reasonably believes that the client is at risk of substantial harm due to diminished capacity, under MR 1.14(b) the lawyer may take protective action, not only to help the client participate in the representation, but also to allow the lawyer to comply with others rules of professional conduct, such as MR 1.2(a), MR 1.1 or MR 1.3. The protective action includes seeking help from third parties in determining whether to seek the appointment of a guardian ad litem, guardian or legal representative.[4]

Lawyers who decide to reach out for professional assistance under the rule may be concerned about disclosing confidential information in the process. That concern is addressed squarely in MR 1.14(c) which states clearly that the lawyer is impliedly authorized under Rule 1.6(a) to reveal confidential information about the client, as long as the lawyer discloses only enough information reasonably necessary to accomplish the contemplated protective action.[5]

It is important to note that all actions taken by a lawyer pursuant to MR 1.14 are subject to the standard of reasonableness. The lawyer is not expected to be an expert in psychology or medicine. Nor is she expected to be certain about the substantial harm that may come to the client if she takes no protective action. As in other cases where the "reasonable lawyer" standard is used, what is reasonable will depend on the circumstances. In some cases, a lawyer may conclude that she can maintain a normal client-lawyer relationship with the help of family and other accommodations to assist, but not overrule the client in the decision making process. In other cases, consultation with professionals for assistance may suffice. Ultimately, the lawyer may conclude that the client's interests can only be protected by a guardian ad litem or other legal representative and take action for the appointment of one.[6] Even where

[2] *See MC v. GC*, 866 N.Y.S.2d 96 (Bronx Supreme Ct. 2009)(court vacated divorce settlement where wife's pro bono lawyer from large firm was incompetent and not supervised adequately, observing that the firm was obligated to ensure that pro bono lawyer's provided the same quality representation that it provided to paying clients").

[3] *See* detailed discussion of MR 1.14(a) below).

[4] *See* Key Terms and Phrases section and detailed discussion of MR 1.14(b) below.

[5] *See* detailed discussion of MR 1.14 (c) below.

[6] Comment 5 to MR 1.14 states that "such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision making tools such as durable powers of attorney

others may request the appointment of a guardian or legal representative, ultimately, the lawyer must exercise her professional judgment.[7]

The Comments to MR 1.14 elaborate on how a lawyer may accomplish the goals set forth in the rule and guidance is also provided by ethics opinions and case law, many of which are discussed in this Report. Unfortunately, few ethics opinions and case law address the handling of clients with diminished capacity in immigration matters. However, there is significant discourse on the subject of diminished capacity in immigration cases in government, scholarly and not-for-profit publications that can be very helpful to immigration lawyers who lack experience dealing with clients with diminished capacity or children.[8] We incorporate information from those sources in discussing special areas of concern, such as conflicts of interest, representation of unaccompanied minors, and guardianships, among others.

In the immigration context, while there is no parallel to MR 1.14 in the Federal Rules of Practitioner Conduct,[9] immigration lawyers should be aware that sanctions may be imposed for failing to provide competent representation [8 CFR §1003.102(o)], failing to act with diligence and promptness [8 CFR §1003.102(q)] and failing to maintain proper communication [8 CFR §1003(r)] in connection with the representation of a client with diminished capacity.

In addition, lawyers must be aware of state law relating to appointment of legal representatives and guardians and the scope of a guardian's duties. Lawyers must also check their home state's version of MR 1.14, since not every state has adopted the rule verbatim,[10] and should check the state's version of related rules, which may also vary, such as the duty of confidentiality.[11] For that reason, this Report also includes a summary of state variations from MR 1.14. Lastly, we will provide hypotheticals involving immigrations cases and MR 1.14.

A. Text of Rules

ABA Rule 1.14—Client with Diminished Capacity

To review the full text of MR 1.14 and the comments, please visit the *Model Rules of Professional Conduct: Table of Contents* on the American Bar Association's website.

B. Key Terms and Phrases

Diminished Capacity

MR 1.14 is titled "Clients with Diminished Capacity" and is limited only to those clients whose capacity to make "adequately considered decisions" in connection with the "representation" is diminished.[12] The phrase is not defined in the rules. Many people make bad decisions in their lives, but

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or consulting with support groups, professional services, adult-protective agencies or other individuals or entities that have the ability to protect the client."

[7] *See* Comment 7.

[8] *See, e.g.*, Representing Clients with Mental Competency Issues Under Matter of M-A-M, Practice Advisory, Legal Action Center, American Immigration Council; *Ethical Issues in Representing in Children in Immigration Proceedings*, AILA Ethics Practice Advisory; ABA Standards for the Custody, Placement and Care, Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States, ABA Commission on Immigration 2004; The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers, Olga Byrne, Elise Miller, Vera Institute of Justice, March 2012.

[9] *See* 8 CFR §1003.102.

[10] For example, California has not adopted the ABA Model Rules and does not have an analogous rule to MR 1.14.

[11] Lawyers may find summaries of state variations of Model Rules in each of the Ethics Compendiums covering MR 3.3, MR 1.6, MR 1.1, MR 1.3 and MR 1.16, respectively.

[12] In 2002, MR 1.14 was amended to provide more flexibility in describing a client's competence to make decisions in the context of the client-lawyer relationship. The title was changed from "Client Under a Disability" to "Client with Diminished Capacity." According to the

may still have the capacity to make a well-reasoned decision as to a legal matter, especially after discussions with their lawyer. Diminished capacity may result from a mental impairment or minority, among others.

Reasonably

The term "reasonably" appears in MR 1.14 in several places. In the first section [MR 1.14(a)], the lawyer is required to maintain a normal client-lawyer relationship with a client with diminished capacity "as far as reasonably possible." In the second section (MR 1.14(b)), the word is used twice: the lawyer must "reasonably believe" that the client has diminished capacity and if so may take "reasonably necessary" protective action under certain circumstances. In the last section (MR 1.14(c)), the lawyer is given the authority to disclose confidential information but "only to the extent reasonably necessary to protect the client's interests."

MR 1.0(h) explains the meaning of "reasonable" and "reasonably" stating that when they are "used in relation to conduct by a lawyer," it "denotes the conduct of a reasonably prudent and competent lawyer."

Believes

The permitted protective actions set forth in MR 1.14(b) may only be taken when the lawyer "reasonably believes" that the client has diminished capacity. Under MR 1.0(a) "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

Implied Authorization

MR 1.14(c) advises that in situations involving clients with diminished capacity, disclosures of confidential information in the service of taking protective action come within one of the exceptions to the duty of confidentiality under MR 1.6(a), *i.e.*, that such disclosures are "impliedly authorized." There is no definition of the phrase under MR 1.0, but Comment 5 to MR 1.6 provides several examples of situations in which a lawyer would be deemed to have implied authorization. These circumstances include admitting an otherwise indisputable fact or disclosing information that facilitates a satisfactory conclusion to a matter, both of which would be beneficial to the representation.

Substantial

MR 1.14(b) uses the term "substantial" in describing the degree of harm—"physical, financial or other harm"—that may come to a client with diminished capacity if the lawyer does not take protective action envisioned by the rule. The term "substantial" is defined "as a matter of clear and weighty importance…when used in reference to degree or extent." See MR 1.0(i). This is similar to the way the term is used in the exceptions to the duty of confidentiality pertaining to certain types of cases involving "substantial" injury to financial interests and property as well as "substantial bodily harm" or death. See MR 1.6(b) (1)(2) and (3).

Guardian

This term is not defined under the Model Rules but is generally understood to be a person appointed by a court to assume total responsibility for the care of another who is incapable of caring for himself. Black's Law Dictionary defines a guardian as a person "lawfully invested with the power, and charged

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Reporter's notes, the change in the caption and other conforming changes in the terminology used in the text of the rule was made to "more accurately express the continuum of a client's capacity." [emphasis added]

with the duty, of taking care of the person and managing the property and rights of another person, who, for defect of age, understanding, or self-control, is considered incapable of administering his own affairs. One who legally has responsibility for the care and management of the person, or the estate, or both, of a child during its minority.[13] Lawyers should refer to state law as to the specific duties and responsibilities of a guardian, as well as the procedures for appointment.

Guardian Ad Litem

This term is also not defined under the Model Rules but is generally understood to be a guardian appointed by a court in pending litigation matter solely to represent the ward. Black's Law Dictionary defines a guardian ad litem as a "special guardian appointed by the court in which a particular litigation is pending to represent an infant, ward or unborn person in that particular litigation and the status of guardian ad litem exists only in that specific litigation in which the appointment occurs."[14] Lawyers should refer to state law as to the specific duties and responsibilities of a guardian ad litem, as well as the procedures for appointment

C. Annotations and Commentary

MR 1.14(a) provides that when "a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."[15]

Normal Client-Lawyer Relationship

The first prong of MR 1.14 establishes the overriding principle that even when a client has an impairment or condition that diminishes his ability to make appropriate decisions in connection with the representation, a lawyer must "as far as reasonably possible" maintain a "normal client-lawyer relationship."

Comment 1 to MR 1.14 describes a normal client-lawyer relationship as one based on the assumption that the client has the capacity—mentally or physically—to make decisions that will affect the client's well-being, but in particular decisions that relate to the underlying purpose of the representation. In a normal client-lawyer relationship, the lawyer is required to follow the client's instructions. Obviously, if the client appears at times to lack capacity to make well thought out decisions, the lawyer must take that into consideration in determining how to go forward with the relationship.[16] The lawyer would have a heightened duty to ensure adequate communication about the objectives of the representation as required by MR 1.4.[17] In addition, except as provided in MR 1.14(c), discussed below, as part of a normal client-

[13] Black's Law Dictionary

[14] Black's Law Dictionary

[15] *See detailed discussion of MR 1.14 (a) below.*

[16] *See ABA Formal Ethics Op.* 96-404 (1996)(the obligation to maintain a normal client-lawyer relationship "implies that the lawyer should continue to treat the client with attention and respect, attempt to communicate and discuss relevant matter, and continue as far as reasonably possible to take action consistent with the client's directions and decisions"); *Oregon Ethics Op.* 2005-159 (2005)("short of a client being totally non-communicative or unavailable due to his or her condition, a lawyer can most often explain the decisions that the client faces in simple terms and elicit a sufficient response to proceed with the representation").

[17] *See, e.g., In re Flack*, 272 Kan. 465 (Kan. 2001)(where lawyer used a for-profit marketing company to sign-up trusts and estates clients, court found that lawyer failed to maintain a normal client-lawyer relationship with hospitalized elderly client under MR 1.14 by sending non-lawyer marketing company representative to the hospital to have client's daughter execute various estate planning documents (under power of attorney) to be issued that day).

lawyer relationship, the lawyer would be required to maintain client confidences (MR 1.6),[18] and abide by the client's decisions about the objectives of the representation (MR 1.2(a)). In a normal client-lawyer relationship, even when a lawyer is convinced that the client has made an irrational decision that is against the client's best interests, the lawyer is not permitted to substitute her own judgment.[19] However, Comment 3 to MR 1.14 advises that a lawyer may enlist a client's family member or close friend to participate in discussions between the client and the lawyer. Where such assistance is considered necessary, the presence of family members or close friends should not affect the client-lawyer privilege.[20] Even under those circumstances, however, the lawyer must rely on the client, not the family member or friend, to make the decisions.[21] Where a client already has a legal representative (such as a guardian), the lawyer would ordinarily abide by the representative's decision.[22]

In the immigration context, a normal client-lawyer relationship would involve in the first instance the client expressing the desire to obtain legal status. He would need to be able to answer fact questions about his background including information about family, how he entered the country, any prior involvement with immigration authorities, criminal record and any other information the lawyer would find helpful in determining the courses of relief available to him. The lawyer would need to explain to the client the process by which the available relief could be attained and the benefits and risks in applying. Ultimately, the client would have to decide what course of action was best for him. This might also include what is best for other family members as well. The client and the lawyer would need to be able to work closely together in mutual trust and respect and the client would need to be able to assist the lawyer in the process and participate fully and competently in any hearing. For instance, before deciding to pursue an application for naturalization, even if to maintain eligibility for public benefits, the lawyer must consider the client's criminal record, history of paying income taxes and child support, inadvertent voter registration, and how the client gained permanent residence.

Diminished Capacity—Causes

The mandate that a lawyer maintain a normal client-lawyer relationship to the extent reasonably possible with a client with diminished capacity applies to those with mental or physical impairments and minors.[23]

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[18] *See, e.g., Conn. Ethics Opinion* 05-12 (September 22, 2005)(where elderly client did not exhibit evidence of diminished capacity, lawyer may not discuss his concerns about wisdom of financial decisions which he thinks are bad to third parties under Rule 1.6).

[19] *See, e.g., In Re Lee*, 754 A.2d 426 (Md. Ct. Spec. App. 2000)(lawyer improperly acted contrary to the client's wishes by waiving client's right to be present at trial, making recommendations to court and seeking to prevent hearing on disability, in the name of the client's "best interests.") *Holmes v. Levenhagen*, 600 F.3d 756 (7th Cir. Ind. 2010)(where convicted defendant challenging death sentence on appeal suffered from mental illness, court cited Rule 1.14 for the proposition that lawyer would need to seek appointment of guardian ad litem before proceeding with a habeas corpus action).

[20] *See* Comment 2; *Mass. Ethics Op.* 05-3 (2005)(where divorce client's depression interferes with ability to assist lawyer in trial preparation, MR 1.14(b) permits lawyer to enlist help from client's close friends and relatives to persuade client to meet with lawyer prior to trial and may seek a continuance if client fails to do so, despite client's objections).

[21] *See* Comment 4 to MR 1.14.

[22] There may be situations in which a party for whom a guardian has been appointed may be deemed to have the capacity to make certain decisions. *See, e.g., Mulinix v. Sartin* (*In re Holly*) , 2007 OK53 (2007) (client for whom a "limited guardian" had been appointed along with court-appointed lawyers, deemed to have the capacity and legal right to seek discharge of court-appointed lawyers; nominated lawyers did not violate spirit of Rule 1.14 by meeting with the client before consulting with limited guardian or seeking his approval.)

[23] In some circumstances, the fact that a foreign national has diminished capacity may in and of itself provide a basis for relief, such as where the client is trying to prove asylum based on a particular social group of individuals with severe mental illness. However, if the client's level of impairment precludes him from making a reasoned decision as to his well-being, as discussed in more detailed below, the lawyer may need to seek the appointment of a guardian under MR 1.14.

Mental or Other Impairment

Clients of any age may suffer from mental illness, such as depression or bi-polar disorder, which affects the client's capacity to make well thought out decisions.[24] Some clients of advanced age may also lack the capacity to make appropriate decisions in connection with the representation because of dementia.[25] Some may suffer from alcoholism.[26] Others may have a cognitive disability.[27]

MR 1.14 is not triggered by mere character traits which appear sporadically, *e.g.*, outbursts of anger or mood swings, which may temporarily render the client incapable of making well thought out decisions or otherwise participating fully in the representation. As long as the lawyer is satisfied that the client is capable of making well thought out decisions, the lawyer need not take protection action under MR 1.14.

Minors

Minors are presumed to lack the capacity to make well thought out decisions concerning their own welfare and for that reason comes within the protections afforded by MR 1.14. The terms "majority" or "minor" are not defined in the Model Rules but they refer to the age of legal competence[28] which in the United States is usually the age 18.[29] A person deemed a minor is not permitted to make legally binding agreements. However, Comment One notes that children of age five or six and certainly those of ten or twelve have opinions that should be weighed in connection with the legal proceedings at hand, *e.g.*, custody.[30]

There is a difference, however, between weighing a minor's wishes concerning the objectives of the representation, such as in child custody cases, and blindly following the minor's wishes, if the child is making the decision on the basis of outside pressures or the failure to truly comprehend the consequences of the decision. For this reason, minors are generally not permitted to choose their own

[24] *See, e.g., Alabama State Bar Formal Op.* 1995-03 (applying the requirements of Rule 1.14 to client suffering from manic-depression in the manic stage).

[25] *See, e.g., Missouri Bar Informal Advisory Op.* 990095 (under Rule 4-1.14, lawyer handling estate planning matters for elderly client showing signs of Alzheimer's disease who has no family member or friend to intervene to protect client's interests, may ethically consult with social services agency for assistance, but may not disclose concerns to probate court unless in context of appointment of guardian.); *See id.* at 325–326 for brief suggestions about how to determine if a client's judgment is diminished, either through a "decisional capacity" test or a basic orientation test. *See also* ABA Commission on Law and Aging & American Psychological Assoc., Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005).

[26] *See, e.g., North Dakota Bar Op.* 00-06 (June 28, 2000)(Rule 1.14 triggered in divorce case where client is alcoholic, lawyer believes disclosure of addiction important factor in claim for spousal support, client refuses to permit disclosure in the case, and lawyer concerned that client's alcoholism is basis for diminished capacity inquiry).

[27] *See, e.g., Franco-Gonzales v. Holder*, CV No. 10-02211(C.D. Cal. April 23, 2013 (diminished capacity due to mental retardation [IQ level between 33 and 55]).

[28] *See* Comment 1, MR 1.14; Law Dictionary: What is MINOR? definition of MINOR (Black's Law Dictionary): "An infant or person who is under the age of legal competence. A term de-rived from the civil law, which described a person under a certain age as less than so many years."

[29] Lawyers should check the legal age of majority in the appropriate jurisdiction. In Mississippi, for example, the age of majority is 21.

[30] *Comment 1 to MR 1.14.*

counsel or try to commence a legal proceeding through appointed counsel.[31] Lawyers should check their home state's law regarding what actions if any may be commenced by a child.[32]

Minors in Immigration Matters

In immigration matters, the term minor is not defined. However, under The Homeland Security Act of 2002, for purposes of dealing with "unaccompanied alien children" (UAC or unaccompanied minor) a child is defined as someone who has no lawful immigration status in the United States, is under 18 years of age, and has no parent or legal guardian in the United States, or parent or legal guardian in the United States that is able to provide care and physical custody.[33]

Under other immigration law, the term "child" is used to apply to a person under the age of 21, who satisfies certain conditions.[34] In immigration practice, the term "juvenile" is also used and defined.[35] Immigration lawyers should keep those definitions in mind when representing minors as well as state law pertaining to minors.

Immigration lawyers may be called upon to represent unaccompanied minors seeking to obtain immigration benefits through asylum or special immigrant juvenile status seeking immigration relief.

MR 1.14(b) provides that when "the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."[36]

Because there may be cases in which a lawyer cannot maintain a normal client-lawyer relationship despite all efforts, MR 1.14(b) gives the lawyer the option of taking action that protects the client and also allows the lawyer to continue the representation in compliance with his ethical duties.

In particular, the second prong of MR 1.14 provides the lawyer with the discretion to take "protective action" on the client's behalf, but in limited circumstances. The protective action, however, may be taken only to prevent substantial harm that will result unless protective action is taken. This may include reaching out to others who are in a position to take protective action or seeking the appointment of a guardian ad litem, a conservator or guardian, the appointment of the latter being considered appropriate only in the most extreme circumstances.

A lawyer may even take legal action on behalf of a person who consulted with but has not formally retained the lawyer, or at the good faith request of a third person who has consulted with the lawyer about the person and where "the health, safety or a financial interest of a person with seriously

[31] *See, e.g., Hartley v, Hartley*, 886 p.2d 665 (Colo. 1994)(in determining that under applicable state law, child does not have right to counsel of his own choosing in custody matter, court also noted comment to Rule 1.14 which states that child not competent "to make legally binding decisions."); *In the Interest of W.L.H.*, 292 Ga. 521 (Ga. 2013)(12 year old minor child acting through his court appointed lawyer lacks standing to appeal without approval of his legal guardian and guardian ad litem).

[32] In New York, for example, a child over 14 is entitled to petition directly for the appointment of a guardian. *See* Surrogate's Court Procedure Act §1703.

[33] *See* U.S. Department of Justice, Executive Office for Immigration Review, Operating Policies and Procedures Memorandum 07-01, "Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children" (May 22, 2007) at p. 3.

[34] INA Section 101(b)(1) provides, in part, that a "child" is an "unmarried person under 21 years of age."

[35] Under 8 CFR §1236.3 a juvenile is defined as "an alien under the age of 18." The regulations also use the word "minor" when describing aliens, under 14 years of age, yet do not precisely define this term. 8 CFR §1236.2.

[36] *See* MR 1.14(b).

diminished capacity is threatened with imminent and irreparable harm." [Emphasis added.][37] MR 1.14(b) also applies to lawyers who serve as "standby counsel" for a client who has chosen to proceed pro se.[38]

Reasonable Belief

A careful reading of MR 1.14(b) shows that all actions are subject to the standard of reasonableness.

When Clients May Not Be Able to Act in Their Own Interests

Most lawyers do not have training to determine a client's capacity to make well thought-out decisions. For that reason MR 1.14(b) requires only that a lawyer have a "reasonable belief" that the client suffers from diminished capacity. The lawyer is not required to "know," but she must have more than a suspicion or hunch of diminished capacity.

Comment 6 to MR 1.14 provides several factors that may lead to a reasonable belief that a client has diminished capacity warranting protective action. They include balancing the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.

With respect to minors, the lawyer may need to undertake a more pointed analysis. A New York City bar opinion lists factors to be considered in assessing a minor's capacity to make well thought out decisions regarding the representation as follows:

> Among the relevant considerations are the minor's developmental stage, *i.e.*, with the lawyer and to articulate reasons for his decisions, the minor's decision-making process (including whether the minor's decision stems from minor has made, and whether the minor is consistent in his preference or frequently changes his mind), and the minor's ability to understand the consequences of his decision including, where relevant, the risks of harm and the possible finality of the decision.[39]

A lawyer may not feel he has the ability to evaluate the above factors without additional help. In such cases, MR 1.14(b) permits the lawyer to confer with an appropriate medical or mental health diagnostician or other professional.[40] Because such consultation would result in the lawyer disclosing confidential information about the client's diminished capacity, MR 1.14(b) gives the lawyer some leeway, and as discussed below, under MR 1.14(c), disclosures made in connection with taking protective action are impliedly authorized. Because lawyers may be disclosing confidential information, which may involve child abuse or neglect, lawyers should check applicable state mandatory reporting requirement.[41]

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[37] *See* Comment 9 to MR 1.14 limits such actions to those in which the lawyer "reasonably believes that the person has no other lawyer, agent or other representative available." Comment 10 to MR 1.14 advises that any lawyer rendering emergency legal assistance in such circumstances normally would not seek compensation but should take additional steps to normalize the relationship which would provide a foundation for implementing other protective measures as well.

[38] *See, e.g., Pennsylvania Bar Assoc. Inquiry* 2000-79 (December 4, 2000)(standby counsel in criminal case where client wants to represent himself is subject to all rules of professional responsibility and particularly Rule 1.14 as it relates to whether the client has the capacity to make the decision to represent himself in the first instance).

[39] *New York City Ethics Op.* 1997-2 (1997).

[40] *See* Comment 6 to MR 1.14; *ABA Formal Op.* 96-404(August 2, 1996); *ABA Informal Formal Op.* 89-1530 (October 20, 1989)(consultation with client's physician permissible under MR 1.14)

[41] *See* Child Welfare Information Gateway, which provides every state's mandatory reporting requirements, *available online at https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm*.

In the immigration context, a lawyer may be employed by or do pro bono work with a not-for-profit social/legal services agency that employs other professionals in a state that requires social workers and mental health workers to report child abuse (or other physical dangers). Under MR 1.14(b), the lawyer is permitted to consult with third parties as part of taking protective action. Under MR 1.6 a lawyer is permitted to disclose confidential information "to prevent reasonably certain death or substantial bodily harm."

Normal best practice for the prudent and conscientious immigration lawyer would be to obtain the client's informed consent to reveal such information to third parties. Informed consent would include advising the client of state mandatory child abuse reporting requirements for those with whom the lawyer may be working in connection with representation. However, in cases where the client has diminished capacity, the client may or may not have the capacity to provide informed consent. Also, children who have been subject to abuse often do not want that information disclosed for fear of retaliation by the abuser or shame and may not give their consent. Such factors regarding the client's capacity to make informed decisions should be considered in determining to seek the appointment of a guardian ad litem.

Risk of Substantial Harm to Client

Because in many instances a client's diminished capacity may not pose a general threat to the client's well-being, under MR 1.14(b), the lawyer's ability to take reasonably necessary protective action is limited to situations in which the client is at the risk of "substantial" harm. The harm may be physical (*e.g.*, involving abuse, suicide, or lack of medical treatment),[42] financial (*e.g.*, where the client is a risk of being defrauded or entering into a sure to fail business transaction), or harm relating to the legal outcome of the representation. Notably the client need only be at risk of substantial harm—not necessarily face an imminent threat.

As discussed, the protective action is subject to the standard of reasonableness. In many circumstances, there may be a very strong downside to taking protective action. For example, the appointment of a legal representative may be more costly or emotionally harmful for the client than the consequences of not seeking appointment of one. If however, the appointment of a guardian ad litem were the only practical way to protect the client, the scale would be tipped in favor of taking protective action.[43]

Examples of Protective Action

Some of the measures that constitute protective actions include consulting with family members, seeking more time from the appropriate authorities when deadlines are involved, employing voluntary decision making tools such as powers of attorney or turning to individuals, support groups, agencies or

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[42] *See L.A. County Ethics Op.* 504(2000)(where MR 1.6 not adopted in California and exceptions are very limited, lawyer who believes minor client lacks capacity to make informed decision that lawyer not to disclose sexual assault may not disclose that information unless and until she takes protective action, such as petitioning for appointment of guardian ad litem at which time the lawyer may disclose the minor's information and abide by the guardian's instructions); *Virginia Legal Ethics Op.* 1816(August 17, 2005)(criminal defense lawyer must follow suicidal client's decision to pursue strategy that is likely to result in death penalty unless the lawyer has reasonable basis to believe client suffers from diminished capacity and takes appropriate protective action; fact that defendant deemed competent to stand trial does not preclude conclusion that client has diminished capacity for purposes of Rule 1.14).

[43] *See Connecticut Ethics Op.* 97-35 (where lawyer engaged to represent 4 year old child in seeking social security benefits, parents are at odds as to who should be the payee on behalf of child, lawyer learns that child has been removed from mother's care in the past for abuse and father has a criminal record, lawyer may pursue a position separate from the parents, by seeking the appointment of a guardian ad litem).

organizations that have the capacity to protect the client.[44] Notwithstanding the available choices, the lawyer must always engage in a benefit/burden analysis.[45]

One area in which immigration lawyers take protective action is "special immigrant juvenile status" (SIJS) which actually requires the involvement of a state juvenile court in making a finding of abuse, neglect or abandonment, and taking protective action, since the state court is considered to be best suited to making a finding regarding these family law issues. The SIJ petition requires an appropriate family court order.

MR 1.14(c) states that Rule 1.16 "protects information relating to the representation of a client with diminished capacity" and provides that when "taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests."[46]

MR 1.14(c) reminds lawyers that as in the case of all normal client-lawyer relationships information about the client is confidential under MR 1.6. However, under MR 1.6(a) authorization to disclose confidential information may be "implied" for purposes of taking protective action, and in that sense is deemed the equivalent of actual consent.[47]

MR 1.14(c) makes clear that when the purpose of the disclosure is to take protective action, the disclosure is impliedly authorized.[48] This is consistent with Comment 5 to MR 1.6, which suggests that most clients would authorize their lawyer to reveal confidential information when it helps to achieve the ultimate objective of the representation.[49] However, under MR 1.14(c) the extent of the disclosure is limited.[50] For that reason the lawyer must consider whether the party to whom the information is disclosed might use it adversely. This limitation is similar to those imposed under the permissive exceptions in MR 1.6(b), when a lawyer must reveal confidential information in order to prevent or remedy a fraud on the tribunal (MR 3.3) or when seeking to explain the reason for a motion to withdraw (MR 1.16).[51]

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[44] *See* Comment 5 to MR 1.14.

[45] *Id.*

[46] *For a comprehensive discussion of MR 1.6, see Chapter 5 of the Ethics Compendium.*

[47] *Id.*

[48] *Id.*

[49] Comment 5 to MR 1.6 provides in part:

> Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

For a comprehensive discussion of MR 1.6, see Chapter 5 of the Ethics Compendium.

[50] *See* Comment 8 to MR 1.14 which states in part

> "…given the risks of disclosure, paragraph (c) limits what the lawyer may disclose in consulting with other individuals or entities or seeking the appointment of a legal representative. At the very least, the lawyer should determine whether it is likely that the person or entity consulted with will act adversely to the client's interests before discussing matters related to the client. The lawyer's position in such cases is an unavoidably difficult one."

[51] *ABA Formal Op.* 96-404 (The "narrow exception in Rule 1.6 [implied authorization] does not permit the lawyer to disclose general [sic] information relating to the representation.").

Special Areas of Concern

Representation of Mentally Impaired Clients Seeking Immigration Benefits

Even under the best of circumstances an immigration lawyer faces many challenges in maintaining a "normal client-lawyer relationship" because of language and cultural barriers. Immigration law is complex and ever changing, and often difficult to explain even when there are no barriers to communication. When a foreign national client also suffers from diminished capacity, his lawyer faces even greater challenges. Immigration lawyers not only need to hone their communication skills and enlist outside support under MR 1.14, they should also be aware of the Immigration Court's policies and procedures for the treatment of foreign nationals with mental impairments.

One area of concern is the representation of adults who have mental disorders, particularly those in immigration custody. On the preliminary issue of competency to participate in proceedings, in Matter of M-A-M, the BIA set forth a framework for immigration judges to follow when hearing cases involving respondents who exhibit "indicia of incompetency."[52] To be found competent, the foreign national must be able to understand the nature and object of the proceeding, consult with an immigration practitioner (assuming there is one) and have a reasonable opportunity to examine adverse evidence, present favorable evidence and cross-examine government witnesses.[53]

The immigration judge must make findings on the record and implement appropriate safeguards to ensure a fair hearing.[54] The safeguards may include securing legal representation or the appearance of a family member or close friend to provide assistance, appointing a guardian,[55] or seeking administrative closure if other safeguards fail. In the case of a mentally impaired client who is detained, administrative closure—which amounts to an indefinite stay of proceedings—does not automatically lead to release from detention and the foreign national may be detained and kept in a legal limbo for years. In such circumstances, the competent and diligent immigration lawyer may need to consider filing a habeas petition.[56]

While one of the safeguards cited in Matter of M-A-M is legal representation, there is no general right to appointed counsel in immigration matters. However, immigration lawyers who represent detained foreign nationals with severe mental disabilities in Arizona, California and Washington should be aware of a recent California federal district court class action suit in which the court ordered that mentally impaired detainees in those states must be provided with "qualified legal representatives" at government expense in removal and bond proceedings.[57]

In addition to the guidance provided in the M-A-M and Franco-Gonzalez decisions addressing adequate protections for mentally impaired foreign nationals in proceedings, EOIR issued comprehensive guidelines for cases involving immigration detainees with serious mental disorders that may render them

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[52] *Matter of M-A-M*, 25 I&N Dec. 474, 477(BIA 2011).

[53] *Id.*

[54] *Id.* at 481-482.

[55] As reflected in the Comments 5 and 7 to MR 1.14, because the appointment of a guardian would be the most dramatic limitation of a person's autonomy, lawyers should try to pursue less intrusive alternatives such as a guardian ad litem or even a power of attorney.

[56] Representing Clients with Mental Competency Issues Under Matter of M-A-M, Practice Advisory, Legal Action Center, American Immigration Council at 6,

[57] *See Franco-Gonzales v. Holder*, CV No. 10-02211(C.D. Cal. April 23, 2013)(based on federal law enacted in 1973 concerning discrimination against individuals with disabilities, court ordered that non-citizen detainees with severe mental disabilities be provided with qualified representatives (as a reasonable accommodation as defined by 8 CFR §1292.1 in removal and bond hearings; representation deemed a reasonable accommodation under the law)

mentally incompetent to represent themselves.[58] The procedural protections involve screening for serious mental disorders of detained foreign nationals, availability of competency hearings and independent psychiatric or psychological examinations, procedures to make available qualified representatives to detainees found to be incompetent to represent themselves in immigration proceedings and also in bond proceedings after they have detained for at least six months.

Under MR 1.14, a lawyer appointed by the government under Franco-Gonzalez or the new EOIR protocols, may also need to consider whether further protective action is to be taken, such as the appointment of a guardian under state law.

Representation of Unaccompanied Alien Children Seeking Immigration Benefits

The significant increase in the number of unaccompanied children entering the United States in recent years, particularly along the southwest border, has created special challenges for immigration lawyers.[59] The children have come to the U.S. hoping to escape violence and persecution from their home country, for economic opportunities, or to join other family members.[60] Many lawyers who provide representation to children in these cases do so on a pro bono basis under the auspices of non-profit organizations such the Vera Institute of Justice (funded by the ORR)[61], KIND (Kids in Need of Defense)[62] and ProBAR.[63]

Before addressing the changes in practices in the immigration courts in cases involving children and techniques that may be used by lawyers who represent children, we provide a brief overview of the bureaucratic framework of UAC cases.

Preliminary Processing and Treatment of UAC

To begin, several agencies of the Department of Homeland Security (DHS) take part in the apprehension, processing and repatriation of unaccompanied minors. The U.S. Customs and Border Protection (CBP) officers apprehend many UACs at or near the border. The U.S. Department of Health and Human Services (HHS) is responsible for the care and custody of these children through the services of the Office of Refugee Settlement (ORR) on the basis that many UACs are victims of trafficking or have an asylum claim. Immigration Customs and Enforcement (ICE) is responsible for transporting UACs to HHS-ORR, which detains and shelters them while they await an immigration hearing, which is conducted by the EOIR.[64] When a child is in ORR custody, the ORR may determine to house the child in one of its shelters or to release the child to the care and custody of an approved "sponsor". A sponsor

[58] *See* Phase 1 of Plan to Provide Enhanced Procedural Protection to Unrepresented Detained Respondents with Mental Disorders, *available at http://immigrationreports.files.wordpress.com/2014/01/eoir-phase-i-guidance.pdf.*

[59] *See* Unaccompanied Alien Children: An Overview, Congressional Research Service, September 8, 2014 [Lisa Seghetti, Alison Siskin, Ruth Ellen Wasem].

[60] *See* Young and Alone, Facing Court and Deportation, The New York Times, August 2012 *available at http://www.nytimes.com/2012/08/26/us/more-young-illegal-immigrants-face-deportation.html?pagewanted=all*.

[61] *See* The Flow of Unaccompanied Children Through the Immigration System, Vera Institute of Justice, March 2012, Olga Byrne and Elise Miller.

[62] KIND (Kids in Need of Defense) KIND finds pro bono attorneys in well-regarded law firms and corporations throughout the U.S. who agree to represent KIND's child clients in their immigration proceedings. KIND pro bono coordinators in each office provide training on representing unaccompanied children in the U.S. immigration system and comprehensive mentorship until the case is completed.

[63] The South Texas Pro Bono Asylum Representation Project (ProBAR) is a national effort to provide pro bono legal services to asylum seekers detained in South Texas by the United States government. The project recruits, trains and coordinates the activities of volunteer attorneys, law students and legal assistants. ProBAR is a joint project of the American Bar Association, the State Bar of Texas and the American Immigration Lawyers Association.

[64] *See* Congressional Research Service Report IN10107, Unaccompanied Alien Children: A processing flow chart, by Lisa Seghetti.

is a responsible adult, usually a relative or a foster-care provider, who agrees to care for the child's physical, mental and financial well-being and ensures that the child attends all scheduled immigration court appearances and otherwise complies with any immigration orders. In the vast majority of cases the child is reunited with a family member.[65] However, removal proceedings continue whether or not the child is now in the care of a family member.[66]

EOIR Policies and Practices for Handling UAC Cases in Immigration Courts

With respect to Immigration Court proceedings, EOIR has implemented specific policies for UAC cases which address the challenges faced by immigration judges. These policies were set forth in a memorandum from the Chief Immigration Judge to all Immigration Court Judges, Administrators, Judicial Clerks and Staff in 2007.[67] Competent and diligent lawyers representing unaccompanied minors in immigration court should be aware of these guidelines, not only to make sure they are being observed, but also because many of the underlying principles may be helpful to the lawyer in being an effective advocate for these children. Basically all of the guidelines are designed to help the child feel more comfortable and better able to participate in a meaningful way in the proceedings.

First, as a matter of administration, immigration judges are called upon to establish special dockets for UACs so that they will be separated from the population of adults in removal proceedings. With respect to the courtroom atmosphere, immigration judges are advised to permit child-friendly modifications of the courtroom such as allowing the child to bring a toy or to sit with an adult companion. The judge may choose not to wear his robe. Children are permitted to visit the courtroom prior to the hearing to become familiar with the physical setting so that it will be less intimidating. In addition to trial preparation by the child's lawyer, the immigration judge should take it upon himself to explain the purpose of the removal proceeding and how it will be conducted, *e.g.*, explaining to the child about "objections" during his testimony or that it is permissible to answer a question by saying "I don't know" if that is the case. Overall, the immigration judge should develop skill in employing child-sensitive questioning.

It makes sense for lawyers representing unaccompanied minors to adapt many of the same practices as a way of complying with MR 1.14's requirement that the lawyer maintain a normal client-lawyer relationship as far as reasonably possible with a child.

Techniques for Lawyers who Represent Unaccompanied Alien Children (UAC)

Lawyers representing UACs in immigration proceedings, most often pro bono and sometimes with little experience, must be familiar with the provisions of MR 1.14 and act in accordance with the guidance provided. As already discussed, this includes a heightened duty of communication with the child. The lawyer also must do everything possible to provide competent and diligent representation, among other obligations.

Central to achieving competency in representing UACs, and also complying with MR 1.14, is understanding the difference between representing a child and an adult in immigration matters and learning the techniques that will enable the lawyer to maintain "as far as reasonably possible" a normal

[65] As reported in the Congressional Research Service Overview, the ORR UAC Fact Sheet, 2014, ultimately 85% of UAC are reunited with their families.

[66] A more detailed description of the bureaucratic framework and processing of UAC up until the child's first appearance in immigration court may be found at pp, 13-21 of the Vera Institute of Justice publication.

[67] *See* Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, May 22, 2001.

client-lawyer relationship with the child. It is generally understood that a child does not have the same capacity as an adult to understand completely her situation and its consequences. This is especially true in UAC cases, which prudent and conscientious immigration lawyers should keep in mind.

For example, the unaccompanied minor may not have had a positive experience with adults in their home country and might not even understand that the lawyer is working for them, as opposed to working for the government. These children may not be accustomed to making decisions about their own lives, let alone being asked to do so. The minor may have suffered physical, psychological or sexual abuse about which they may be reticent to speak or express their emotions. On the practical side, the minor simply may not have experience in keeping appointments or understanding the consequences of missing them or court dates. Given these impediments, the lawyer's obligation to adequately communicate under MR 1.4 requires extra efforts.[68]

There are techniques that a lawyer may use when first meeting and interviewing the UAC, which will help illicit information and go a long way in establishing a reasonably normal client-lawyer relationship. They, and many other helpful instructions, as well as a wealth of reader-friendly substantive information relative to UAC cases, can be found in a training manual published by the non-profit organization, KIND.[69]

Basic techniques for lawyers discussed in the KIND Training Manual recommend that the lawyer:

- Initiate the meeting by explaining the purpose of the interview and by introducing any members of the team.
- Start the interview with small talk, for example, about the child's interests (*e.g.*, soccer, drawing, sport teams, music).
- Allow the child to set the pace of the interview, with appropriate breaks in consideration of a child's limited attention span.
- Be attentive to the child throughout the interview.
- Show the child respect and empathy by not interrupting and by affirming responses when appropriate.
- Use age appropriate language and avoid technical or legal terms.
- Encourage children who do not feel comfortable talking about themselves to draw pictures showing their experiences.
- Recognize when the child may feel overwhelmed.
- Give clear instructions and establish clear expectations.
- Let the child know how to reach you.
- Keep promises.

[68] Immigration lawyers who handle asylum cases for adults have probably encountered similar impediments to communication. They only become harder to overcome when it is a child who has had these experiences.

[69] *See* Chapter 1, Representing Unaccompanied Children: Training Manual for pro bono Attorneys, published by Kids in Need of Defense, and *available at http://www.supportkind.org/en/about-us/resources/manual*. (Substantive immigration law topics covered in the KIND training manual include: Special Immigrant Juvenile Status (SIJS), Asylum, Convention Against Torture (CAT), U Visa, T Visa(Victims of Trafficking and Violence Protection Act of 200-,Violence Against Women Act, and Temporary Protected Status.).

In addition to the help provided by organizations like KIND, the ABA Commission on Immigration established standards for legal representation of children which stresses the importance of training for lawyers, judges and all professionals who deal with UACs.[70] Among the various rules set forth in those guidelines, Section IV-C provides that

> [a]ttorneys, judges, government trial attorneys, and Advocates for Child Protection should receive training in child-sensitive interviewing techniques to assist them in communicating with Children, to create a nonjudgmental, supportive and sympathetic environment that puts the Children at ease to the extent possible and attorneys, and Advocates for Child Protection should also receive training in interviewing Children in a culturally appropriate manner.

With respect to the lawyer's role, in particular, Section V provides that lawyers

- Make certain that the child participates in the proceedings as much as possible, taking into consideration the child's developmental needs, abilities and circumstances.
- Without imposing the lawyer's views initially, explain the legal options and their consequences.
- Advocate, as in all cases, for the child's legal interests in accordance with the child's expressed wishes, even if they conflict with the wishes of a parent or other close adult who is not the child's guardian or legal representative.
- Maintain frequent contact with the child, including prompt contact with the child upon being assigned.
- Maintain the child's right to confidentiality and advise the child about those that are not bound by the same duty of confidentiality as the lawyer.
- Throughout the representation, monitor the behavior of others involved in the proceedings to make sure that the ABA standards being met.[71]

Withdrawal from Representation under MR 1.16 and Obligations under MR 1.14

MR 1.14 provides a set of principles and guidelines for the lawyer to follow once she comes to reasonably believe that her client has diminished capacity. If the lawyer cannot maintain a reasonably normal client-lawyer relationship because the client with diminished capacity is unable to cooperate with the lawyer or make necessary decisions in the course of the client-lawyer relationship, the lawyer may take protective action under MR 1.14. The lawyer also would have a basis for withdrawal under MR 1.16 because a lawyer who represents a client whose impairment makes it impossible to cooperate with the lawyer or make necessary decisions cannot provide competent or diligent representation, among other professional responsibility rules. Under MR 1.16(a) [mandatory withdrawal], the lawyer in that position would be required to withdraw since continued representation would result in violation of another rule or law.[72]

A lawyer might also exercise the discretion to withdraw under MR 1.16(b). The ultimate decision will likely turn on the lawyer's comfort level with the challenges involved in handling the matter for a

[70] *See* Standards for the Custody, Placement and Care; Legal Representation; and Adjudication of Unaccompanied Alien Children in the United States. ABA Commission on Immigration, 2004.

[71] *Id.*

[72] *Ethics Op.* 2006-1 ("Under Rule 1.16 (a)(1) a lawyer must withdraw from representation where the client becomes incompetent both because the lawyer's authority would be revoked by the client's incompetence and because the lawyer would be unable to carry out professional responsibilities to the client under the Rules.)

client with diminished capacity.[73] However, withdrawal from representation of a client with diminished capacity without taking protection action is disfavored.[74] Furthermore, a court likely would deny a motion to withdraw in a diminished capacity case without evidence that the client's interests were being protected by substitute counsel, or the appointment of a guardian, guardian ad litem or legal representative.[75]

Conflicts of Interest under MR 1.7 and Obligations under MR 1.14

No Third-Party Representation

The obligations under MR 1.14 may be in tension with other rules relating to the client-lawyer relationship, but this tension reinforces the basic notion that the representation should always be client driven. Under MR 1.14 the lawyer is permitted to enlist the help of friends, family or other qualified professionals in assessing the capacity of the client or even to merely assist the lawyer in helping the client participate in the representation. It would not be unusual in such situations for one of those parties to suggest or agree to serve as guardian or legal representative of the client, based on the lawyer's reasonable belief that such protective action is necessary. However, the client's lawyer could not ethically represent the third party under MR 1.7(a)-Conflict of Interest since the action would be deemed legally adverse to the client who at that point has not been determined to be incompetent, unless the client consented.[76] A lawyer in such situations should advise the third-party to retain his or her own counsel. If not, the lawyer would have to move on his own for the appointment of a guardian and let the court decide who should be the guardian.

The lawyer generally would not be able to avoid the conflict by attempting to obtain his client's consent, given that the purpose of taking protective action in the first place would be based on the lawyer's reasonable belief that the client is incapable of making decisions in his own interests.[77]

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[73] *Id.* ("A lawyer's own conscience and personal beliefs about moral and ethical conduct may influence the decision to accept the representation and assist the client.") The lawyer should also engage in the same analysis when determining whether to accept a case in the first instance.

[74] *See ABA Formal Ethics Op.* 96-404 (however justified, a lawyer's withdrawal from representing a client with diminished capacity "may leave the impaired client without help at a time when the client needs it most"); *Vermont Ethics Op.* 2006-1 (when the client's competence is not sufficient to protect her own interests, withdrawal only solves the lawyer's problems, may put the client in harm's way and should not be pursued, even if permissible)." *Connecticut Ethics Op.* 94-29 (where a lawyer believes that the minor child's expressed wishes or instructions are against the child's best interests and would justify withdrawal under MR 1.16(b)(4), before exercising the option to seek withdrawal, the lawyer should seek appointment of a guardian ad litem for the child).

[75] *See Cheney v. Wells*, 2008 N.Y. Misc LEXIS 2923 (Sur. Ct. New York Co. Nov. 5, 2008 (citing the then not yet adopted model rule version of Rule 1.14, Surrogate's Court permitted lawyer to withdraw from representation of defendant client in probate matter, where at least three previous lawyers had been given permission to withdraw for reasons consistent with Rule 1.14, court had observed client's psychological problems causing diminished capacity first hand and lawyer agreed to commence guardianship proceeding under the state's applicable mental hygiene laws).

[76] *See* Comment 29 to 1.7 which states in pertinent part:

> For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained.

See also ABA Formal Ethics Op. 96-404; s*ee Wyatt's Case* 159 N.H. 285 (N.H. 2009)(court found in disciplinary proceeding that taking protective action under Rule 1.14(b) not a defense to conflict of interest violation where lawyer represented conservator of ward in seeking appointment of limited guardian for medical purposes, whether or not the court ultimately finds that ward suffered from incapacity; two-year suspension based on other violations as well); *Mass. Bar Assoc. Ethics Op.* 05-05 (inappropriate for lawyer for elderly former client to represent son in seeking guardianship where former client may oppose and lawyer may be called as witness).

[77] *Dayton Bar Ass'n v Parisim* 131 Ohio St.3d 345 (Ohio 2012)(in disciplinary case, where lawyer retained by client who claimed that she was being held against her will in a nursing home, lawyer initially filed an application for guardianship which she withdrew but later filed separate guardianship application on behalf of the client's niece, court found lawyer engaged in conflict of interest in violation of Rule 1.7(a)(2)).

Dual Representation

The general prohibition against third-party representation may be waived where there is evidence that the client still has the capacity to understand and consent to dual representation. For example, dual representation would be permitted where a lawyer previously represented a client in seeking the appointment of a guardian for certain purposes, and later the client and the guardian agree to bring a proceeding to terminate the guardianship.[78] This conclusion allows for the possibility that even a client with diminished capacity as to some matters is still capable of making decisions as to others. However, since under MR 1.7, the lawyer would need to take steps to be sure that the client grants "informed consent" in writing, the lawyer would need to explain that should a conflict arise between the client and the guardian each would have to retain new counsel unless the client provides informed consent at that point.[79]

In the immigration context, a child's adult representative may retain the lawyer on the child's behalf. In such cases, the lawyer must make clear that her client is the child only. In the case of unaccompanied children, the lawyer may be asked to represent an adult petitioner to be appointed guardian and later represent the child in the immigration proceeding. That may present a potential conflict for the lawyer if, at a later time, the guardian's interests and the child's differ. In such cases, the lawyer may need to withdraw. If the lawyer withdraws, he may undertake to seek the appointment of a guardian on behalf of his former client—the child. In order to avoid even the potential for such a conflict, it is advisable that separate lawyers represent the adult petitioner in family court and the child in immigration proceedings.[80]

Lawyer Serving as Guardian or Guardian ad Litem

Depending on state law governing appointment and duties of a guardian, a lawyer may be permitted to serve solely as a guardian. In such situations the lawyer would not be deemed to be subject to the rules of professional conduct, which apply to the client-lawyer relationship, as long as the lawyer-guardian makes every effort not to provide legal advice or engage in other conduct that could be construed as the practice of law. When the ward has separate counsel, there is greater clarity as to the distinct roles of each and the risk of any potential conflict of interest is much lower.[81]

There are other circumstances under which a guardian who happens to be a lawyer may be permitted by statute to serve in what is sometimes referred to as a hybrid role.[82] This hybrid role occurs most commonly in child abuse, neglect or dependency cases, but the scenario may place the lawyer in a very difficult position where there is no bright line as to the lawyer's potential conflicts. Normally there is a distinction between the duties of a lawyer and those of a guardian ad litem: the lawyer is bound to represent the interests of the client and the guardian ad litem is appointed by the court to represent the

[78] *New York State Bar Ethics Op.* 836 (February 25, 2010)(elderly client for whom guardian appointed may still have the capacity to consent to dual representation in action to terminate guardianship).

[79] *Id.* ("since the discharge of the Guardian will take place only if the court determines it is appropriate, any concerns …about the feasibility of obtaining informed consent from the incapacitated Client are substantially mitigated.").

[80] *See* AILA Practice Advisory, *Ethical Issues in Representing Children in Immigration Proceedings* at http://www.aila.org/practice/ethics/ethics-resources/2012-2015/ethical-issues-representing-children.

[81] *See Arizona Bar Ethics Opinions* 00-06 (lawyer appointed solely as guardian ad litem for a juvenile where the juvenile has separate counsel is not bound by Rule 1.6's ethical duties of confidentiality).

[82] *See, e.g., ASH v Swope*, No. 13-0458 (Sept. 2103 W. Va.)(because many aspects of a guardian ad litem's representation of an incarcerated person in a family court proceeding comprise duties that are performed by a lawyer on behalf of a client, the rules of professional conduct generally apply to that representation); *In re Christina*, 639 SE 2d 770 (W.Va. 2006) (GAL who was also a lawyer was required in the best interests of the child to disclose information concerning sexual abuse, attorney-client privilege did not apply).

best interests of the ward and to make recommendations to the court.[83] Some jurisdictions take the position that when a lawyer serves as both lawyer and guardian, the first duty is as lawyer to the ward and if a conflict arises, the lawyer should seek to withdraw from the guardianship.

D. Hypotheticals

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: U Visa – 15 year old

A lawyer represents 15-year-old Katia in her application for U nonimmigrant status. Katia was the victim of sexual abuse by her mother's live-in boyfriend. She reported the crime to her school counselor, cooperated with the police in the investigation and then testified against her abuser at trial. Katia qualifies for a U visa because she was the victim of sexual abuse, suffered greatly as a result of this abuse, and was helpful in the investigation of the abuse.

Fatima is Katia's mother. Fatima is in removal proceedings and is represented by separate counsel. Fatima would qualify U nonimmigrant status because she is Katia's mother and Katia is a minor. Applying as a derivative of Katia's application for U nonimmigrant status is Fatima's only form of relief from deportation.

The lawyer strongly believes that Fatima was negligent in allowing her boyfriend to have unsupervised access to Katia. Child Protective Services previously instituted proceedings to remove Katia from Fatima's custody but was unsuccessful in proving allegations against Fatima. As a result Fatima is still Katia's only legal guardian. If Fatima is removed from the United States, Katie will be placed in foster care.

Fatima's lawyer has approached Katia's lawyer to ask him to include Fatima as a derivative on Katia's U visa application. This would require Katia's consent evidenced by Katia's signature on the petition presented by Fatima. Fatima's lawyer has also requested a copy of Katia's file so she can present it to the Immigration Judge in order to request a continuance based on the filing of the U visa application.

Katia has been significantly traumatized as a result of both the abuse and testifying about the abuse in detail at trial. Conversations about the case result in Katia becoming visibly upset—shaking and crying—and usually end with Katia clamming up and being unable to continue the conversation.

[83] *See Estate of Millstein v. Ayers*, 955 p.2d 78 (Colo. Ct. App. 1998)(in proceedings for the appointment of a guardian for an incapacitated person, the guardian as litem functions in a fiduciary capacity making informed decisions on behalf of the ward and the lawyer is charged with pursuing the legal interests of the ward).

Analysis

How does the lawyer counsel Katia? Should he include Fatima as a derivative on the U visa application? Should he give a copy of the file to Fatima's attorney?

Does Rule 1.14 apply?

Yes. Since Katia is a minor (child) Rule 1.14 automatically applies based on the presumption that a child's capacity to make reasoned decisions affecting her welfare is diminished.

What protective action, if any, is the lawyer required to take under Rule 1.14?

As an initial matter, under Rule 1.14(a) the lawyer is required to maintain a normal client-lawyer relationship with Katia as far as reasonably possible. This would include adequate communication with Katia about matters relevant to the representation under MR 1.4 and the obligation to abide by her instructions as to the representation under MR 1.2. The lawyer would also be required to provide competent (MR 1.1) and diligent (MR 1.3) representation, among other requirements.

Adequate communication with a minor requires the lawyer to employ child-centered questioning and discussion techniques to be sure that the child is able to understand the lawyer's questions and advice and that the lawyer is able to correctly understand the child's responses and decisions based on the discussions. Here, the lawyer has an additional communication concern because of Katia's traumatization by the abuse trial. If she cannot talk about the case without getting upset and crying and ultimately "clamming up" the lawyer will have difficulty discussing Fatima's request for help in obtaining U nonimmigrant status derivatively.

Another important part of a normal client-lawyer relationship is the lawyer's obligation to abide by the client's directions regarding the representation. Here, Katia has to decide if she wants to help Fatima avoid deportation by including her in her U visa application. She needs to understand the consequences of the decision she makes. If she refuses, her mother will be deported and Katia will have to go into foster care, which may turn out badly for Katia. She may also have to deal with feelings of guilt and other emotional consequences of refusing to help her mother. If she agrees, she may find after the fact that Fatima is incapable of providing a safe and loving home environment. On this issue, the lawyer would want to try to obtain as much information about the Child Protective Services proceedings as possible from Katia, the agency itself or even Fatima's lawyer. The lawyer must be able to discuss all of these issues with Katia.

In addition, because the lawyer appears to have negative opinions about Fatima's parenting, he must be particularly very careful in discussing that issue and under no circumstances may the lawyer substitute his own judgment for Katia's. Under Rule 1.2 he must abide by her decision.

It is a close question based on these facts as to whether or not the lawyer could on his own form a reasonable belief that Katia had the capacity to make the decision at issue. In this case, the lawyer would be justified under Rule 1.14 in seeking the assistance of a social worker or other professional to assist in the communication process. As a last resort, the lawyer could consider seeking the appointment of a guardian ad litem to explore which course of action would be in Katia's best interests since could exacerbate Katia's trauma.

How should the lawyer handle Fatima's lawyer's request for a copy of Katia's U visa application?

This issue is closely related to Katia's decision about whether to permit her mother to obtain legal status derivatively and the same considerations about the decision-making process discussed above apply. Katia's U visa application is confidential and the lawyer would need Katia's consent to release

copies of file documents to Fatima's lawyer. While Rule 1.14(c) allows a lawyer to reveal confidential information in seeking protection action, this would not apply to Fatima's request, which is not relevant to any protective action for Katia. If Katia declined to consent to Fatima's derivative U visa application, she could still consent to providing copies of her U visa application, which at least would give Fatima a continuance to have more time in the U.S. The alternative of providing as least some assistance to her mother would need to be part of the lawyer's discussion with Katia about whether she wanted to consent to a derivative application.

Hypothetical Two: DACA – 17 year old

Agustin and Perla, themselves undocumented immigrants, retain a lawyer to file an application for Deferred Action for Childhood Arrivals (DACA) for their 17 year old son, Jacob. Jacob seems to qualify for DACA with one caveat. He was arrested for and convicted of contributing to the delinquency of a minor this year when his 13-year-old girlfriend's parents caught them together and called the police. This is not a conviction that would per se disqualify Jacob from DACA pursuant to guidelines issued by USCIS. However, USCIS has stated it will look at the totality of the circumstances for all convictions. After reading the police report and court record, the lawyer's opinion is that the totality of the circumstances surrounding this conviction looks bad for Jacob. The lawyer explains to Jacob and his parents that DACA is a discretionary benefit and that USCIS will look to the totality of the circumstances of his conviction. If the case is denied, there is a risk that Jacob would be referred to ICE for removal proceedings. The lawyer advises against filing the DACA application. Perla and Agustin tell the lawyer they are sure that USCIS will see that their son is a "good boy" and they want to proceed. The lawyer asks to speak to Jacob alone. He explains again the risks and advises against filing. Jacob, who thus far has not said a word, just looks down and shrugs. The lawyer presses him a bit, but Jacob remains mostly silent, just saying, "I guess."

Analysis

Should the attorney take the case for Jacob?

This scenario presents once again the problem of determining what the client wants and whether the client has the capacity to make a reasoned decision in the first instance?

Who is the client?

Jacob. Although Jacob's parents retained the lawyer, they did so on behalf of their son, Jacob. The lawyer is not going to perform any legal services for the parents so this is also not a case a dual representation.

Does Rule 1.14 apply?

Rule 1.14 applies on its face because Jacob is still deemed a minor. Whether or not the lawyer should take protective action in the form of heightened communication skills, seeking the assistance of third parties or even a guardian ad litem will depend on how the circumstances develop. Here we have a situation where the lawyer's best legal judgment is in conflict with his client's parents. Under MR 1.2 he is obligated to abide by Jacob's decision only.

What protective action if any should the lawyer take?

As reflected in the facts, Jacob's parents want the lawyer to pursue DACA, but the lawyer recommends against this on the grounds that Jacob's prior criminal conviction will expose unnecessarily

him to removal. If Jacob were not a minor and did not otherwise exhibit signs of diminished capacity, the lawyer would need to explain the pros and cons of seeking DACA relief, share his recommendation that Jacob not proceed and abide by Jacob's decision. A prudent and conscientious lawyer might request that a client sign a memo in which he acknowledges that his lawyer has advised against it, but wishes to proceed nevertheless. This would protect the lawyer in a disciplinary investigation or malpractice case, if the strategy resulted in the client's deportation.

Here, because Jacob is a minor and because he did not respond in any meaningful way to the lawyer's pointed questions about pursuing DACA, the lawyer has an obligation under Rule 1.14 to maintain a normal client-lawyer relationship with Jacob. At a minimum, the lawyer will have to get Jacob to respond to the lawyer's recommendation that he not go forward. The lawyer will need to employ heightened child centered communication skills to make sure that Jacob understands the DACA process and the pros and cons of proceeding on that basis. Under the scenario, there do not appear to be circumstances justifying additional protective measures.

Hypothetical Three: Asylum – 12 year old

A lawyer, who speaks Spanish fluently, volunteers to represent an unaccompanied Guatemalan child, 12-year old Anibal, in an immigration case. Anibal was detained and placed in removal proceedings, but he has since been released from custody. At their first and only meeting, the lawyer asks Anibal many questions about his life in Guatemala. He is able to answer them and Anibal breaks down crying when talking about the severe mistreatment he and his family suffered. He also tells the lawyer that his father was abusive to both him and his mother. Anibal understands that the lawyer is there to help him, but he tires after meeting with the lawyer for about 45 minutes and asks if he can go home. The lawyer agrees because Anibal is clearly exhausted and upset from their discussion. After meeting with Anibal, the lawyer decides to pursue a strategy that involves an application for special immigration juvenile status (SIJS), rather than asylum. The lawyer believes that the asylum process would traumatize Anibal again. A child seeking SIJS must first ask an appropriate state court to make a determination that the child is dependent on the court and that reunification with one or both parents is not viable for the child due to abuse, neglect, abandonment, or similar grounds under state law. Another lawyer is appointed to represent Anibal in juvenile court, and that court makes the required determination of custody and abuse for the lawyer to file the SIJS petition with USCIS. Anibal is eventually approved for permanent residence by the immigration judge. After getting his green card, Anibal asks the lawyer to help him bring his mother to the United States. The lawyer had not earlier explained that one consequence of SIJS relief is that Anibal would no longer be considered a "child" of his parents for immigration purposes. This means that his parents cannot receive lawful status through Anibal, even if he later becomes a citizen. Anibal tells the lawyer that one of his primary goals in coming to the U.S. was to help his mother come to the U.S. to escape further abuse from his father.

Analysis

This scenario highlights the potential ethical pitfalls in representing a child in an immigration matter.

Does MR 1.14(a) apply in the first instance?

Yes. Since Anibal is a minor (child), MR 1.14 is triggered automatically based on the presumption that a child has diminished capacity. Under MR 1.14(a), the lawyer is required to maintain a normal

client-lawyer relationship with Anibal as far as reasonably possible. This would include adequate communication with Anibal about matters relevant to the representation under MR 1.4 and the obligation to abide by his instructions as to the representation under MR 1.2. The lawyer would also be required to provide competent (MR 1.1) and diligent (MR 1.3) representation, among other requirements.

What special methods or techniques, if any, should the lawyer have considered in representing Anibal under MR 1.14?

In order to maintain the possibility of a reasonably normal client-lawyer relationship, that has a heightened duty to adequately communicate, which in this case would include understanding the differences between representing a child and an adult, employing child sensitive questioning techniques and familiarizing the child with the applicable law and courtroom procedures and settings if a court appearance would be necessary. At a minimum, the lawyer should have understood that children may tire more easily than most adults and that it would be necessary to schedule more frequent and perhaps shorter meetings in order to establish trust and improve the decision-making process before going ahead with the SIJS relief. The lawyer should have set up more than one more meeting, since she did not have a chance to discuss with Anibal his options for obtaining legal status.

Additional meetings with Anibal would have given the lawyer more insight into how Anibal could handle questions about past persecution in order to better evaluate his ability to testify at an asylum hearing. In light of Anibal's initial emotional reaction when discussing past persecution, other options for the lawyer would have included reaching out to the person to whom Anibal was released into custody, if it was a close relative or family friend, to provide emotional support. The lawyer also could have sought professional help for Anibal—through a social worker, for example—to evaluate Anibal's ability to testify about the past persecution or just to help with communication overall.

Here, although Anibal cried and tired after 45 minutes, he did not present any indicia of actual diminished capacity to make reasoned decisions. The lawyer asked Anibal factual questions about his life in Guatemala to help her decide what legal options were open to him, but she failed to discuss the advantages and disadvantages of seeking asylum or pursuing legal status through the SIJS route.

The lawyer, however well intentioned, substituted her own judgment as to the best avenue of relief for Anibal. This violated MR 1.14(a), and even worse, she made the decision without even questioning Anibal about his goals for the representation. If Anibal was expecting to try to bring his mother to the U.S. based on his legal status, he needed to understand that by choosing the SIJS route, he would be foreclosed from doing so. It was improper of the lawyer to deny him that opportunity.

Hypothetical Four: Asylum—Adult Mental Impairment

Mohamed, who is from Sudan, has been taken into custody and placed in removal proceedings after being arrested for disorderly conduct. At the first hearing, the Immigration Judge gives him a continuance and a list of immigration lawyers to consult. Mohamed's cousin contacts a lawyer on the list who agrees to meet with Mohamed. At the first meeting with the lawyer, Mohamed asks for aluminum foil because he needs to wear it for protection from evil spirits. He avoids making eye contact, and, while he speaks English, he is incoherent. At times, he seems emotionless, but then he gets very agitated. He complains about people watching him through surveillance bugs. The cousin explains to the lawyer that Mohamed's father has been killed because of his opposition to the regime in Sudan, and that Mohamed himself had been detained

and mistreated there before being sent abroad by his family. Based on the cousin's representations, the lawyer agrees to represent Mohamed. The lawyer works with Mohamed's cousin to prepare and file an asylum case for Mohamed, and Mohamed's family is able to send supporting statements and other corroborating documents to strengthen the asylum claim. Still, Mohamed is unable to talk about his case and he gets upset whenever the lawyer asks him questions. Mohamed seems unable to understand that he is facing deportation, and his cousin is worried that Mohamed's mental state is getting worse the longer he stays in custody. How should the lawyer proceed?

Analysis

This scenario presents the ethical and practical issues in representing a client with mental health problems that may impact not only on his capacity to make decisions as to the representation, but also his capacity to participate in any court appearances requiring his testimony.

Does MR 1.14 apply here?

Yes. Even without any special training, it should be obvious to the lawyer that Mohamed is suffering from trauma or other mental illness which may impact on his ability to make decisions about the representation and to meaningfully participate in any proceedings in immigration court. Most significantly, the lawyer believes that Mohamed does not even understand he is facing deportation. Since MR 1.14 applies and there is enough evidence to support the reasonable belief that Mohamed "is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest", the lawyer here "may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."[84] As in the case of most civil litigation, under DHS regulations, participation of a guardian ad litem or other legal representative in immigration proceedings is permitted.[85]

What protective action, if any, should the lawyer take?

At a minimum, the lawyer should consider enlisting the help of a qualified mental health professional to evaluate Mohamed's mental state. It may be that medication combined with short term treatment, may minimize Mohamed's irrational behavior so that he is able to at least understand what is at stake and participate some way in the proceedings

Since Mohamed is detained, the lawyer should also be aware of EOIR protocols in dealing with mentally ill detainees. [86]They include screening for serious mental disorders and providing for competency hearings and independent psychiatric or psychological examinations. To the degree that these services were not being offered to Mohamed, the lawyer may need to see to it that these protocols are being followed. In any event, under MR 1.14, the lawyer is clearly permitted to initiate consultation with a mental health professional for evaluation and advice.

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[84] MR 1.14(b).

[85] *See* §1240.4: Incompetent respondents.

> When it is impracticable for the respondent to be present at the hearing because of mental incompetency, the attorney, legal representative, legal guardian, near relative, or friend who was served with a copy of the notice to appear shall be permitted to appear on behalf of the respondent. If such a person cannot reasonably be found or fails or refuses to appear, the custodian of the respondent shall be requested to appear on behalf of the respondent.

[86] *See* Operating Policies and Procedures Memorandum 07-01: Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children, May 22, 2001.

If after consulting with a mental health professional, the lawyer reasonably believes that Mohamed's mental illness is such that he cannot make decisions as to the representation or meaningfully participate in the proceedings, under MR 1.14 the lawyer would be permitted to take protective action in the form of seeking the appointment of a guardian ad litem, albeit, admittedly is a serious step.

Assuming that a guardian ad litem is appointed, what are the lawyer's ethical obligations in continuing to represent Mohamed? What role does the guardian ad litem play?

The lawyer's ethical responsibilities to Mohamed continue to be essentially the same even with the appointment of a guardian ad litem, except that the lawyer would look to the guardian ad litem to make the necessary decisions in the client's best interests after receiving counsel from the lawyer.[87] Here, it is in Mohamed's best interests to obtain legal status and under the facts, seeking asylum appears to be the only viable substantive form of relief.

However, the lawyer's concerns about Mohamed's ability to testify credibly about his mistreatment by government authorities are real. While the guardian ad litem might be heard on the question of whether it would be in Mohamed's best interests to remain in the U.S. to obtain proper mental health treatment, it does not appear that she would be able to provide testimony that would assist the Immigration Judge in assessing Mohamed's credibility as to his asylum claim. She has no first-hand knowledge about what happened to Mohamed in Sudan.

In considering whether to proceed with an asylum claim, the lawyer must also consider the effect of prolonged detention on Mohamed during the pendency of an asylum proceeding. Under the best of circumstances, prolonged detention would take its toll. Here, the lawyer should be sure to have Mohamed's competency to participate in an immigration hearing evaluated by a mental health professional. If the medical professional believed that Mohamed's mental impairment was treatable, the lawyer would have the option of seeking a continuance for that purpose. In such a case, the lawyer would need assurance that Mohamed would be provided with adequate mental health care in detention. Without such assurance, the lawyer would be justified in moving for termination of removal proceedings for release and treatment. Administrative closure would not be a good alternative if it resulted in detention for an indefinite period.

In the normal course, the lawyer would be ethically required to discuss the advantages and disadvantages of the different options with the client. When there is a guardian ad litem, the lawyer would have those discussions with the guardian ad litem, who would make recommendations based on the lawyer's evaluation of the facts and law to assist the guardian in making decisions in Mohamed's best interests.

We cannot conclude which is the best option based solely on the facts presented here. However, as long as the lawyer here took protective action in accordance with Rule 1.14 as described above, it is very unlikely that the lawyer would be subject to any disciplinary action, even if Mohamed were removed.

Hypothetical Five: Asylum – 14 Year Old

Xochitl is a 14-year-old native and citizen of El Salvador. Her father has been in the U.S. since 1999 and is currently in TPS status. Without the consent of her father, Xochitl paid a coyote to bring her to the United States. While crossing the border at Laredo, Texas without authorization, she was detained by CBP along with ten other individuals. After being processed and placed in removal proceedings, she was released to her father pending her upcoming hearing. Xochitl and

[87] Lawyers are reminded to check applicable state law regarding appointment and duties of guardians.

her father come to the lawyer's office to discuss any defenses to Xochitl's removal proceeding. During the consultation Xochitl tells the lawyer she came to the U.S. to avoid being recruited by the local gangs. Xochitl provides some information, which includes among other things, information regarding incidents that have occurred to her, her neighbors, and schoolmates. However, she has little proof from others of any incidents to support her asylum application. The lawyer believes available documents may be sufficient to support a petition for asylum. The lawyer does not feel her case is frivolous.

After completing the initial consultation, at which Xochitl's father pays a small retainer. The lawyer is convinced that Xochitl's only relief from removal is Asylum or Voluntary Departure. The father advises the lawyer that he wants Xochitl to pursue voluntary departure so that Xochitl can be with her mother and grandmother in El Salvador. He supports this form of relief because Xochitl's mother is ill and her grandmother is aging and unable to care for Xochitl's mother much longer. The father has spoken with Xochitl's mother and grandmother who have assured him Xochitl is not in much danger in El Salvador. The father appears to genuinely believe that going back to El Salvador is best for Xochitl as well but Xochitl is firm about wanting to remain in the U.S. and apply for asylum. The father has stated that he feels so strongly that Xochitl return home that he will retain a different lawyer if the lawyer does not pursue the pre-hearing voluntary departure order.

Analysis

This scenario addresses the question of whether a client's status as a child without more warrants protective action under Rule 1.14 where the client's wishes appear to conflict with those of the person paying the lawyer's fee.

Who's the client?

Xochitl. As an initial matter, the lawyer is obligated to establish up front that the client in this situation is Xochitl even though her father is paying the fee. The lawyer must advise the father that under MR 1.8(f), he is precluded from allowing a third party to influence or control the representation because it would be a conflict of interest.[88] He must also advise the father that under MR 1.2 he is obligated to abide by the client's direction as to the relief sought. As a practical matter, this may create difficulty for the lawyer since the father can always try to find another lawyer who will follow his instructions, arguably in violation of the rules.

Does Rule 1.14 apply here?

Yes. Since Xochitl is a minor (child), MR 1.14 is triggered automatically based on the wording of the rule and the presumption that a child has diminished capacity. Under MR 1.14(a), the lawyer is required to maintain a normal client lawyer relationship with Xochitl as far as reasonably possible. This would include adequate communication with her about matters relevant to the representation under MR 1.4 and the obligation to abide by her instructions as to the representation under MR 1.2. Although MR 1.14 allows the lawyer to look to a child's parent(s) for guidance, if there is a conflict, his duty of loyalty

[88] *See* Comment 13 to MR 1.8 and MR 1.8(f) which provides that :

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

is to the client, here Xochitl.[89] The lawyer would also be required to provide competent (MR 1.1) and diligent (MR 1.3) representation, among other requirements.

What protective action, if any, is the lawyer required to take under Rule 1.14?

Other than her status as a minor, there are no indications in the scenario that Xochitl's capacity to make a reasoned decision about her welfare is diminished. Her decision to hire and pay a smuggler to bring her into the U.S. to join her father on its face cannot be a basis on which to conclude that her decision was made without due consideration. On the contrary, Xochitl's actions suggest that she may be more mature than the average 14 year-old and she also does not seem to be intimidated by her father's insistence that the lawyer pursue voluntary departure.

Accordingly, in the first instance, the lawyer must be sure to communicate adequately with Xochitl about her case outside the presence of her father. This would include discussing in detail the reasons why she disagrees with her father about returning to El Salvador voluntarily. The lawyer would need to explain to Xochitl in language suited to her age, the pros and cons of taking voluntary departure or seeking asylum. He would have to walk her through the procedural steps of pursuing an asylum case and the consequences of the denial of her claim. The lawyer would need to explore Xochitl's response to the assertions by her mother and grandmother, as reported by her father, that she would not be in "much danger" if she returned to El Salvador and lived with them. He would need to explore her feelings about be required to care for her mother. The lawyer also would need to investigate further the father's motivation in insisting on voluntary departure. Is it based on his good faith belief that his daughter will be safer in El Salavdor than she believes? Is he more concerned about finding someone to care for his wife than his daughter's best interests?

Notwithstanding, Xochitl's demeanor, given that Xochitl is a minor, the lawyer would be justified in seeking the assistance of an appropriate professional such as a social worker to assist in the questioning or even speak separately to the father and Xochitl. Such assistance is permitted under MR 1.14.

Assuming that Xochitl still refused to accept voluntary departure, what other protective steps might the lawyer be required to take under MR 1.14? Are there other professional responsibility rules that come into play here?

The lawyer here faces a number of ethical problems that arise not only from Rule 1.14, but other rules which relate to the client-lawyer relationship. As discussed above, under MR 1.2 he is ethically obligated to abide by Xochitl's decision to pursue asylum. Under MR 1.8(f) he cannot allow the father's payment of the fee to foster a "substantial risk" of undue influence or control the representation. However, as a practical matter, the girl's father might simply refuse to pay the legal fees going forward or, as he has stated, retain another lawyer. If either occurred, since Xochitl is already in disciplinary proceedings and the lawyer has been retained, under MR 1.16 and immigration court rules, the lawyer would need to seek permission to withdraw. At a minimum, the lawyer would need to explain his ethical responsibilities to the father and Xochitl.

The most prudent course of action for the lawyer would be for the lawyer to consider seeking the appointment of a guardian ad litem on the basis that Xochitl is a minor and the disagreement over the ultimate goal of the representation.

The lawyer would need to check the home state's rules regarding appointment of a guardian ad litem. In addition, the lawyer would need to check the immigration court rules and procedures concerning the role of the guardian ad litem in the proceedings.

Hypothetical Six: Asylum—Adult Mental Impairment

Arturo, a 32 year-old man from San Pedro Sula, Honduras, has been detained and placed in removal proceedings. His aunt and uncle meet with a lawyer and retain him to handle a bond re-determination and secure Arturo's release from ICE custody. Due to Arturo's incarceration, the lawyer is not able to meet with Arturo in person, although he has a few very brief telephone conversations with him. The lawyer's main contact about the representation is with Arturo's aunt. The lawyer meets with Arturo very briefly just before the bond hearing commences and is successful in obtaining Arturo's release. Although the lawyer observes that Arturo is anxious during the hearing, he does not observe any behavior that suggests to him that Arturo has mental health problems; nor do Arturo's ICE records reveal any documented concerns about his behavior.

After his release, Arturo comes to the lawyer's office for a consultation. He tells the lawyer that he was a victim of violence and intimidation in Honduras and expresses his acute fear about returning to his home country. Arturo is able to describe in detail the violent and intimidating acts against him which are consistent with the current conditions from the country reports and reports from Amnesty International. Because the lawyer does not view Arturo's case as frivolous, he discusses the possibility of Arturo's seeking political asylum in the United States. Arturo tells the lawyer he wants to pursue an asylum claim and agrees to meet with the lawyer again to work on the case. The next day, Arturo's aunt calls the lawyer to advise him that Arturo has suffered from a mental disability since he was a teenager and has been found to be delusional at times.

Analysis

This scenario presents the issue of assessing an adult's alleged diminished capacity and taking appropriate protection action under Rule 1.14.

Who's the client?

Arturo. Although Arturo's aunt and uncle retained the lawyer, they did so on his behalf and there is no question that Arturo is the client.

Does Rule 1.14 apply here?

Since Arturo is not a minor and the lawyer initially has no reason to believe that Arturo suffers from diminished capacity, Rule 1.14 does not automatically apply. However, once Arturo's aunt tells the lawyer that Arturo can be delusional as a result of a long-standing mental disability, the lawyer cannot ignore that information. Competent and diligent representation would require that the lawyer investigate further to ascertain if the aunt's assertion is correct. Since the inquiry concerns whether Arturo suffers from diminished capacity, which may impair his ability to make reasoned decisions, Rule 1.14 applies.

What protective action, if any, is the lawyer required to take under Rule 1.14?

Because the lawyer did not personally observe any behavior by Arturo that appeared delusional, the lawyer would need to speak further with the aunt to find out why she had not previously advised the lawyer about the issue and if she could provide evidence to support her assertion. He might consider

speaking with Arturo directly about the aunt's allegation. He might conduct a mock direct examination or cross-examination to see if Arturo's testimony was consistent with the first consultation. Unless it was clear to the lawyer that the aunt's allegations were completely without support, the lawyer would probably need to obtain an independent evaluation of Arturo's mental health, in accordance with Rule 1.14.

Whether or not further protective action is required would depend on the medical professional's findings. The medical professional could conclude that the aunt's allegation was unfounded and that Arturo, while admittedly emotionally vulnerable as a result of his treatment in Honduras, is not mentally impaired. If that were the case, the lawyer would have a basis to proceed with the asylum claim with confidence that he had complied with Rule 1.14.

Even if the medical professional concluded that Arturo suffered from some mental disability, he might also conclude that his claims about violence and intimidation were not delusional and he might be able to testify credibly about the events with short-term treatment for the disability prior to the merits hearing. Conversely, if the medical professional concluded that Arturo was delusional and left him with diminished capacity to make reasoned decisions about the representation in the first instance, under Rule 1.14, the lawyer would have no choice but to seek the appointment of a guardian ad litem.

The lawyer would need to check the immigration court's rules and procedures concerning mentally impaired respondents, which among other things, permit the appearance of a guardian, guardian ad litem or legal representative if a respondent cannot appear because of mental incompetence. The lawyer also might want to seek a continuance so that Arturo could receive treatment. If the medical professional concluded that Arturo's mental disability was untreatable and would clearly prevent him from providing meaningful testimony, the lawyer might consider seeking termination of the proceedings altogether.[90]

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Meghan Moore

Alejandro Solorio

David Bloomfield

Kenneth Dobson

Reid Trautz

Maheen Taqui

[90] As a matter of strategy, not ethics, the lawyer would need to consider whether there was sufficient proof to support the position that Arturo's mental disability (assuming there is one) was a result of gang induced violence and intimidation providing grounds for asylum.

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American Immigration Lawyers Association

AILA ETHICS COMPENDIUM

ABA MODEL RULE 1.15
SAFEKEEPING PROPERTY

Theo Liebmann, Reporter

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MODEL RULE 1.15 SAFEKEEPING PROPERTY

Introduction and Background

When lawyers obtain property of clients or third persons in the course of a representation, they must treat it with the care, prudence, and diligence of a professional fiduciary. These fiduciary duties are wide-ranging. They include ensuring any funds belonging to clients or third persons are not commingled with the lawyer's own funds;[1] safekeeping money, physical property, and documents in which others have an interest;[2] providing prompt notice and delivery of funds to which others are entitled;[3] and engaging in diligent record-keeping.[4]

One of the most challenging aspects of adhering to these responsibilities is that state adaptations of Model Rule 1.15 vary widely, and often carry highly specific guidance that is unique to that jurisdiction. ***It is therefore imperative in assessing how to act ethically with regard to safekeeping of property that a lawyer looks at the rule adaptation in the jurisdiction for guidance.***

Rule 1.15 covers three basic principles related to a lawyer's duty to safeguard property:

- *Strict separation of property*: lawyers must keep the property of others separate from their own property.
- *Prompt notification and delivery*: when lawyers have property in which another person has an interest, they must act promptly to notify that person; and where the person is entitled to the property, the lawyer must deliver it promptly.
- *Diligent record-keeping*: lawyers must keep complete and accurate records of property kept for others.

Each of these principles applies whenever a lawyer obtains possession of the property of another in connection with the provision of legal services.[5]

Strict separation of property

[1] MR 1.15(a)

[2] *See, e.g., Fla. Bar v. Grosso*, 760 So. 2d 940 (Fla. 2000) (lawyer failed to safeguard and promptly return client's firearms); *Idaho State Bar v. Frazier*, 28 P.3d 363 (Idaho 2001) (theft of estate jewelry in lawyer's custody discovered after lawyer left items in briefcase at law office and at jeweler's for unreasonably long period); *In re Rathbun,* 124 P.3d 1 (Kan. 2005) (lawyer failed to deliver mail that client entrusted to him for forwarding to estranged husband)*; In re Gold,* 693 So. 2d 148 (La. 1997) (after declining representation lawyer refused to return documents brought for his review by prospective client).

[3] MR 1.15 (d), (e).

[4] MR 1.15(a), (d).

[5] MR 1.15, cmt. 5. Note however that some jurisdictions have applied provisions related to prompt notification and delivery to situations where a lawyer was not engaged in representing a client. *See, e.g., People v. Rishel*, 50 P.3d 938 (Colo. O.P.D.J. 2002) (lawyer who belonged to group that pooled funds to purchase baseball tickets violated equivalent of Rule 1.15(d) by misusing funds); *In re McCann*, 894 A.2d 1087 (Del. 2005) (lawyer disciplined under equivalent of Rule 1.15(d) for failing to pay firm payroll taxes); *Att'y Grievance Comm'n v. Johnson*, 976 A.2d 245 (Md. 2009) (provisions of Rule 1.15(d) "ha[ve] been interpreted by this Court to apply "generally' to the fiduciary duties connected with an attorney's holding of "any property'[; so] the practice of law is not a prerequisite for an attorney to have violated" rule); *see also* ARIZ. ETHICS OP. 04-03 (2004) (lawyer who received funds from former client's sale of home cannot withdraw unpaid fees from those funds because he did not represent former client in home sale; Rule 1.15(d) nevertheless applies and requires former client's instructions for disbursement).

Rule 1.15 requires lawyers to keep the property of clients and other third-party individuals or entities completely separate from their own property.[6] Strict separation entails the maintenance of a separate account for a client's money in the state where the lawyer has their office.[7] The sole exception under the Model Rules version of Rule 1.15 is that a lawyer may put their own funds into a client's account for the purpose of paying account service charges.[8] The property of multiple clients generally may be kept in one account, but there are strict record-keeping requirements in the rule to ensure that each client's property is properly recorded and protected.[9]

The strict separation of a lawyer's funds from their clients' funds ensures that a lawyer's creditors cannot access a client's or third party's money and prevents lawyers from using client accounts to shield their money from creditors.[10]

Other provisions of the rule address specific situations regarding when a lawyer can withdraw funds from a client account. The rule prohibits, for example, the lawyer's withdrawal of money from a client's account for the payment of fees and expenses until those fees and expenses are earned or incurred.[11] And when there is a dispute over fees or expenses owed to the lawyer, the disputed amounts must be kept in a separate account until the issue is resolved.[12]

Violating Rule 1.15 by commingling funds and/or failing to keep complete and accurate records of client funds is treated by courts and disciplinary authorities with the utmost seriousness. It is, in most jurisdictions, a strict liability violation. The intent of the lawyer is irrelevant.[13] The fact the client was

[6] MR 1.15(a).
[7] MR 1.15(a).
[8] MR 1.15(b).
[9] MR 1.15(a).
[10] *See In re Anonymous*, 698 N.E.2d 808 (Ind. 1998) (commingling of lawyer and client funds would subject clients to "unacceptable risks," such as attachment by creditors, or intended or unintended misappropriation by lawyer); *In re Glorioso*, 819 So. 2d 320 (La. 2002) (by commingling, lawyer put clients' funds at risk of being seized by IRS to satisfy lawyer's tax liability); *See In re Johnson*, 809 S.E.2d 797 (Ga. 2018) (lawyer deposited personal funds into client trust account to shield them from his creditors); *In re Lund*, 19 P.3d 110 (Kan. 2001) (lawyer claimed trust account held only client funds in effort to avoid garnishment by his ex-wife to satisfy outstanding judgment); *Att'y Grievance Comm'n v. Powell*, 192 A.3d 633 (Md. 2018) (depositing personal and family members' funds into client trust account to avoid scrutiny of IRS or divorce court); *In re Rebeau*, 787 N.W.2d 168 (Minn. 2010) (lawyer deposited earned fees in client trust account to shield funds from IRS); *Disciplinary Counsel v. Vogtsberger*, 895 N.E.2d 158 (Ohio 2008) (lawyer may not use client trust account as "'safe haven' for his money to avoid his personal financial responsibilities"); *In re Tidball*, 503 N.W.2d 850 (S.D. 1993) (lawyer commingled funds and used bank drafts to avoid garnishment by lawyer's personal creditors); *In re Trejo*, 185 P.3d 1160 (Wash. 2008) (lawyer used out-of-state client trust account to shield assets from garnishment by ex-wife). In addition, these protections also apply to prospective clients. MR 1.15, Cmt. 1.
[11] MR 1.15(c).
[12] MR 1.15(e).
[13] *See In re Mayeaux*, 762 So. 2d 1072 (La. 2000) (lawyer's "mistake, good faith, or lack of conscious wrongdoing does not negate an infraction of the rule"); *Att'y Grievance Comm'n v. Sperling*, 185 A.3d 76 (Md. 2018) ("an unintentional violation of 1.15(a) is still a violation"); *State ex rel. Okla. Bar Ass'n v. Helton*, 394 P.3d 227 (Okla. 2017) (lawyer who unintentionally overpaid himself out of funds that were to be held for client's benefit committed simple conversion); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 5 cmt. d (2000) ("Some few offenses, such as those requiring maintenance of office books and records . . . are absolute in form, thus warranting a finding of a violation . . . no matter what the lawyer's state of mind"). *But see* Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1 (Winter 2010) (arguing that some intent element should be implicit in Rule 1.15; "commingling lawyer and client funds and improper use of client funds are almost always the product of either knowing or negligent conduct, and there is little reason to believe that bar counsel would have any difficulty in proving negligence when it occurs").

not harmed by the commingling does not typically constitute a defense.[14] There are, in fact, very few defenses against commingling charges that have proved effective in any jurisdiction.[15]

Prompt notification and delivery

When a lawyer receives property to which their client or a third person is entitled, they must promptly notify that person, and must deliver the property promptly as well.[16] There are sensible exceptions to the prompt distribution requirement. If there is a dispute over the property, the portion in dispute need not be distributed until the issue is resolved (though the portion not in dispute must still be promptly distributed);[17] when the lawyer and client or third person have otherwise agreed that the lawyer will not immediately disburse the property, prompt distribution is not required (though ***notification*** is required even where an agreement has been made for the lawyer to hold or transfer the property);[18] and if there is some other law or rule that permits the lawyer to withhold prompt distribution of the property, then that delay is permitted under the Rule.[19]

Diligent record-keeping

Rule 1.15 requires that complete records of property and funds kept for a client or third party be maintained for a period of five years after the representation ends.[20] Although the Rule itself does not specify what

[14] *See In re Anonymous*, 698 N.E.2d 808 (Ind. 1998) ("that client funds were never . . . at risk" is irrelevant to charge of commingling under rule); *In re Webre*, No. 2017-B1861, 2018 WL 456373 (La. Jan. 12, 2018) (after depositing client funds into personal account instead of trust account, lawyer refunded unearned balance from trust account, causing no harm to client but "potential harm to other clients"); *Att'y Grievance Comm'n v. Whitehead*, 890 A.2d 751 (Md. 2006) (lawyer withdrew fees earned as conservator without court approval, though he promptly returned unapproved fees); *In re Klotz*, 909 N.W.2d 327 (Minn. 2018) (intentional misappropriation, commingling, and mismanagement of client's funds did not permanently injure any client but "harmed the public and the profession because it eroded the public's trust in lawyers and reflects poorly on the profession"); *Cleveland Metro. Bar Ass'n v. Walker*, 32 N.E.3d 437 (Ohio 2015) (commingling personal and client funds, failing to properly reconcile trust account or keep proper records); *In re PRB Docket No. 2013.160*, 118 A.3d 523 (Vt. 2015) (holding uncashed title insurance trust account checks payable to law firm for seven months); *In re Trejo*, 185 P.3d 1160 (Wash. 2008) (discipline warranted even if commingling causes no actual harm because it causes potential harm of having client funds attached by lawyer's creditors).

[15] *See Wrighten v. United States*, 550 F.2d 990, 991 (4th Cir. 1977) (lawyer's contention that he had reimbursed "almost" all of client monies was no defense); *In re Freel*, 433 N.E.2d 274 (Ill. 1982) (fact that disciplinary proceeding was pending against lawyer wasn't valid reason to delay turning over funds to client); *Cleveland Bar Ass'n v. Sterling*, 629 N.E.2d 400 (Ohio 1994) (lawyer's domestic problems and alcoholism not a defense); *In re Koehler*, 628 P.2d 461 (Wash. 1981) (office fire didn't justify lengthy delay of six months in one case and three years in another); *Louisiana State Bar v. Mayeux*, 184 So. 2d 537 (La. 1966) (lawyer's "dire financial circumstances" not a defense); *Maryland Attorney Grievance Comm'n v. Stolarz*, 842 A.2d 42, 20 Law. Man. Prof. Conduct 98 (Md. 2004) (defense that oversight was product of "innocent error" was unavailing, as rule has no good faith error exception); *In re LaQua*, 548 N.W.2d 372 (N.D. 1996) (delay attributable to procrastination and lethargy not justified even though there was no fraud, dishonesty, or deceit and lawyer did not convert assets to own benefit); *see also* MISS. ETHICS OP. 121 (1986) (pending appeal of favorable judgment does not suspend lawyer's duty to notify and deliver; proper procedure is to pay money to client and advise client that appellate reversal could change legal ownership of funds).

[16] MR 1.15(d).

[17] MR 1.15(e).

[18] *See, e.g., In re Struthers*, 877 P.2d 789 (Ariz. 1994) (funds can be claimed by lawyer only after proper notification and accounting); *In re Lochow*, 469 N.W.2d 91 (Minn. 1991) (retainer received for future services may be withdrawn from trust account only after client is first given notice and accounting).

[19] MR 1.15(d).

[20] MR 1.15(a).

information must be kept in the records, the ABA Model Rules for Client Trust Account Records, which are referred to in comment 1 of the Rule, provide a detailed list of records that should be kept, including:

- detailed receipt and disbursement journals;
- detailed ledger records for each separate trust client or beneficiary;
- copies of advance fee payment, retainer, and compensation agreements with clients;
- copies of accountings provided to clients or third persons;
- copies of bills for legal fees and expenses rendered to clients;
- the physical or electronic equivalents of all checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution;
- detailed records of all paper and electronic transfers from client trust accounts; and,
- copies of any portions of client files that are reasonably related to client trust account transactions.[21]

Not only must the lawyer keep these records, but they must also promptly give a full accounting to any client or third party for whom they are keeping it.[22]

Rule 1.15 does not address practical questions on how to structure accounts for clients and third-party funds responsibly. There is little guidance in the Rule itself, for example, on what to do with interest earned in those accounts. In general, that is a matter that should be addressed between the client and lawyer prior to the creation of the account.[23] Additionally, every state and jurisdiction have specific rules that either suggest or require that interest from short-term or small accounts go to Interest on Lawyers' Trust Account (IOLTA) programs, which provide the funds to organizations that deliver legal services to indigent individuals.[24] For new lawyers, one excellent resource is AILA's "A New Lawyer's Guide to Interest on Lawyer Trust Accounts (IOLTA)" (AILA Doc. No. 18073132) by Charity Anastasio, which is available to all AILA members free of charge.

Note that the rules and mandates governing trusts, fiduciary duties, and safekeeping of property in general are not always contained in a state's ethics rules, and lawyers must check ethics opinions, state rules governing fiduciary duties generally, and other sources to ensure compliance.[25] In addition, practitioners engaged in multi-jurisdictional practice should be sure to confirm that they are referring to all appropriate state rules pursuant to Model Rules 8.5.

This Chapter, after providing the text of the Rule and Comments, will review the definitions of key terms in the rule, and will offer annotations and commentary on other questions such as:

- *Interest and IOLTAs*
- *Where should the trust fund be located (and which laws apply?)*
- *Advanced Fees: Whose money is it?*

[21] ABA MODEL RULES FOR CLIENT TRUST ACCOUNT RECORDS (RULE 1, RECORDKEEPING GENERALLY), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rules_on_client_trust_account_records.pdf.
[22] MR 1.15(d).
[23] Note that, absent a specific authorization to do so, a lawyer cannot retain the interest of the account. ABA FORMAL ETHICS OP. 348 (1982).
[24] A recent ABA survey shows 46 states, plus the District of Columbia and Puerto Rico, have mandatory enrollment; five states have opt-out provisions (Alaska, Kansas, Nebraska, Virginia, and Wyoming); one jurisdiction, the Virgin Islands, is purely voluntary. *See* https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/.
[25] *See e.g.* South Carolina App. Ct. R. 417 (financial recordkeeping).

- *Returning funds at the termination of representation*
- *What if a lawyer cannot find their client?*

Finally, the chapter will review a number of hypotheticals to assist in better understanding the contexts and nuances in applying Rule 1.15.

A. Text of Rule

ABA Model Rule 1.15 – Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

(b) A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

(c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Comment – Model Rule 1.15

[1] A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order. See, e.g., Model Rules for Client Trust Account Records.

[2] While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

[3] Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

[5] The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

[6] A lawyers' fund for client protection provides a means through the collective efforts of the bar to reimburse persons who have lost money or property as a result of dishonest conduct of a lawyer. Where such a fund has been established, a lawyer must participate where it is mandatory, and, even when it is voluntary, the lawyer should participate.

Selections from Other Relevant Rules

ABA Model Rule 1.16(d) – Declining or Terminating Representation

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Key Terms and Phrases

"Accounting"
Rule 1.15 requires a lawyer to promptly provide a full accounting of any client's or third person's property upon that person's request.[26] Neither the rule itself, nor the comments to the rule, nor the terminology section of the Model Rules, define what constitutes an "accounting." The ABA Model Rules for Client Trust Account Records, however, lists the types of records that should be available and may be required in an accounting to a client or third person:

- Records of receipt and disbursement of property for each separate client or beneficiary;
- Records of retainer and compensation agreements with clients;
- Records of bills for legal fees and expenses rendered to clients; and,

[26] MR 1.15(d).

- Any checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks provided by a financial institution.[27]

"Advance Fee"
An advance fee is compensation paid to a lawyer prior to the legal work being completed, or prior to the costs being incurred. See "*Advance Fees: Whose money is it?"* in Notes and Commentary, *infra*, for ethical considerations in accepting advanced fees.

"Costs"
Costs are expenses incurred by lawyers in the course of representing a client. Costs can include filing fees, court transcripts, and copying papers and exhibits.

"Flat Fee/Hourly Fee"
A flat fee is compensation paid in one set, agreed-upon sum to a lawyer. An hourly fee is compensation paid to a lawyer based on the number of hours worked on a case.

"IOLTA Account"
Interest on Lawyers' Trust Account (IOLTA) programs are state-specific programs that create common funds where lawyers may (or must, depending on the jurisdiction) deposit client funds that are too small to earn their own interest. The interest earned is typically paid to an agency designated for charitable purposes, such as a fund for indigent clients.

"Operating Account"
A lawyer's or law firm's operating account is the bank account maintained by and in the name of the lawyer or law firm for the payment of operating costs and the deposit of monies related to the lawyer or law firm's business.

"Retainer"
A retainer is compensation paid to the lawyer in advance of the services being performed, typically for the purpose of establishing the fee arrangement, the fact that the lawyer will represent the client, and the scope of the representation. There are many specific labels that are used for different types of retainers across different jurisdictions. For example, a "special retainer" typically indicates that the lawyer is paid as yet unearned fees upfront, and an "engagement retainer" or "general retainer" often is used to secure the lawyer's availability in the event of needed representation.

"Promptly"
Rule 1.15 requires "prompt" actions by a lawyer in three circumstances: a lawyer must promptly notify a client or third party of the receipt of a property in which that person has an interest;[28] a lawyer must promptly deliver any such property;[29] and a lawyer must promptly render an accounting of any property the lawyer is holding for a client or third party.[30] There is no guidance in the Rule itself or in the comments on what constitutes prompt action, but that is understandable given that the necessary action may take time, and that numerous factors affect what amount of time is reasonable. An accounting in a complex matter involving an employer hiring a large number of immigrant workers, for example, may require significantly

[27] ABA Model Rules for Client Trust Account Records (Rule 1, Recordkeeping Generally), available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_rules_on_client_trust_account_records.pdf.
[28] MR 1.15(d).
[29] Id. In addition, if a portion of the property being held is in dispute, the lawyer must promptly deliver any portion of the property that is ***not*** in dispute. MR 1.15(e).
[30] MR 1.15(d).

more time than merely notifying a client that an application fee paid by the client has been returned. There are a few court decisions that provide some guardrails. In general, a period of months is too long to notify a client of receipt of funds, and "a few days" is more appropriate; but delivery of funds, once received, should be done "forthwith."[31]

"Property"
Property includes money, documents, and any physical items, including jewelry, mail, passports, and tax returns.[32] It also includes credit card information, digital currencies, and information stored in the cloud.[33] For a detailed discussion of what aspects of a client's file might be considered "property," see *infra*.

"Trust Account"
A trust account is an account in which funds or assets are held by a third party (such as the lawyer) for the benefit of another party (such as the client).

B. Annotations and Commentary

As noted previously, state adaptations of Rule 1.15 vary widely, and often carry specific guidance that is unique to that state. As with every discussion of a Model Rule, it is therefore imperative that a lawyer look at the rule adaptation in their jurisdiction for guidance.

Interest and IOLTAs

As noted *supra*, the prohibition against commingling is unambiguous and strictly enforced. Lawyers must therefore hold the property of clients and third persons in an account separate from the lawyer's own funds. A practical question naturally arises from holding these funds in a separate account – to whom does any earned interest accrue – the lawyer or the client (or third party)? In general, the answer depends on the contractual agreement between the client and the lawyer. Consequently, as with most questions regarding fees, funds, and scope of representation, the best solution is to include a clear agreement on to whom the interest belongs in a written and signed retainer.[34]

[31] *In re Biscanin*, 390 P.3d 886 (Kan. 2017) (six-week delay in returning client funds); *In re Amaral*, 981 A.2d 1027 (R.I. 2009) (finding that a three-month delay in disbursing client funds is a clear violation of the rule); *People v. Coyne*, 913 P.2d 12 (Colo. 1996) (lawyer waited nine months after promising to repay converted escrow funds); *State ex rel. Okla. Bar Ass'n v. Wilkins*, 898 P.2d 147 (Okla. 1995) (delay of four months in one instance and five weeks in another triggered a disciplinary sanction); *Matter of Benjamin*, 139 A.D.3d 110 (N.Y. App. Div. 2016) (six-month delay between the settlement check date and date lawyer delivered client's portion); *see also* N.Y. ETHICS OP. 1127 (2017) (noting that "promptly" means hours or days, not weeks).
[32] *Innes v. Marzano-Lesnevich*, 87 A.3d 775 (N.J. Super. Ct. App. Div. 2014), *aff'd as modified*, 136 A.3d 108 (N.J. 2016) (law firm representing wife in divorce turned over minor child's passport to client in spite of agreement prohibiting parents from traveling abroad with child); *In re Becker*, 504 N.W.2d 303 (N.D. 1993) (client's jewelry stolen from lawyer's car); *Columbus Bar Ass'n v. Kiesling*, 925 N.E.2d 970 (Ohio 2010) (lawyer failed to provide copies of several years' worth of tax returns required to administer estate of client's deceased husband); *In re Blackmon*, 629 S.E.2d 369 (S.C. 2006) (lawyer who retained original wills and deeds became incommunicado after testators' deaths); CONN. INFORMAL ETHICS OP. 92-21 (1992) (abstract of real estate title search prepared for client was client property and must be given to client upon request).
[33] NEB. ETHICS OP. 17-3 (2017) (must safeguard digital currencies such as bitcoin separate from lawyer's property); N.Y. CITY ETHICS OP. 2015-3 (2015) (lawyer following e-mail fraudster's instructions to transfer funds from trust account violates duty to preserve client funds); OHIO ST. BAR ETHICS OP. 2013-03 (2013) (law firm must identify and safeguard electronic client information stored in cloud); N.C. ETHICS OP. 2015-6 (2015) (lawyer who has taken reasonable steps to maintain security of client trust funds as required by Rule 1.15 not required to replace client funds stolen by hacker).
[34] MR 1.5(b).

Absent any agreement, the interest is presumed to belong to the client.[35] In many instances, however, the amount of funds that a lawyer is holding for a client are too small, or the duration of time the funds are being held is too short, to earn interest. Every state has created an Interest on Lawyer Trust Account (IOLTA) plan to manage these situations.[36] The purpose of IOLTAs is to provide an account where lawyers can pool all non-interest-bearing client funds into one account. The resulting interest is then used for some sort of public purpose, typically to assist in providing legal services to low-income communities and clients. Lawyers should check their jurisdiction to determine whether the IOLTA program where they practice is mandatory, voluntary (lawyers must affirmatively decide to participate), or opt-out (lawyers participate unless they affirmatively decide not to).[37]

Where should a lawyer's client trust accounts be located (and which laws apply?)

A lawyer's accounts that hold the funds of a client or third person must be kept in the state where the lawyer's office is situated, or elsewhere if the client or third person consents.[38] The Rule thus permits lawyers, with consent, to hold funds in other jurisdictions. Allowing such flexibility makes sense, especially in a world where lawyers are practicing in multiple jurisdictions more and more frequently.

The corollary question to where the account should be located is which ethical rules apply to the maintenance of funds when the location of the account is different from where the lawyer's office(s) sits. Generally, for conduct before a tribunal, the rules where the tribunal sits apply; for conduct that does not occur before a tribunal, the ethics rules to be applied will depend on where the conduct occurs and where its predominant effect is felt.[39] For misconduct involving a trust account, that often means that the applicable rules are the rules of the jurisdiction where the account sits.[40] There may also be times where it is not obvious where the "predominant effect" of conduct sits, requiring a lawyer to navigate any differences among the jurisdictions' rules.[41] ***Lawyers must therefore be familiar with the rules of any jurisdictions where they have trust accounts for clients or third persons.***

The ability of a lawyer to keep a client trust account outside of the state where their office is located, with the consent of the client, raises another related question: can a lawyer maintain a client trust account in a state where they are not licensed to practice? The answer is yes, but only under certain conditions. If the lawyer is using the accounts for a practice that is permitted by the state under Model Rule 5.5, then the maintenance of an account in that jurisdiction is permissible.[42] Rule 5.5(d)(2) is most relevant to

[35] ABA FORMAL ETHICS OP. 348 (1982).
[36] https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/.
[37] https://www.americanbar.org/groups/interest_lawyers_trust_accounts/resources/status_of_iolta_programs/.
[38] MR 1.15(a). Some states do not allow out-of-state accounts even with client consent; therefore, as always, check your jurisdiction's rules.
[39] MR 8.5.
[40] *See, e.g., In re Overboe*, 745 N.W.2d 852 (Minn. 2008) (in disciplining lawyer licensed in both Minnesota and North Dakota, applicable rules for allegations of trust account violations were those of North Dakota, where lawyer practiced and had bank accounts, but Minnesota rules applied to allegations of failure to cooperate with disciplinary authorities). For a more in-depth look at factors considered in how rules apply, *see* N.Y. STATE BAR OP. 1027 (factors include client's residence and place of work, where payments will be deposited, and where the contract will be performed; opinion notes that "Unfortunately, no simple formula is available to determine where the 'predominant effect' will occur"); Craig Dobson, *The Law of Outlaws: Rules and Jurisdiction When Establishing an Out-of-State Practice Under Rule 5.5(d)(2)*, available at https://www.aila.org/practice/ethics/mjp/rules-jurisdiction-establishing-out-of-state-pract.
[41] *But see* MR 8.5 Cmt. 5 ("So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule").
[42] MR 5.5(c), (d), (e).

immigration lawyers; it explicitly permits lawyers practicing federally authorized law, such as immigration law, to provide legal services in a state where they are not admitted to practice. If a lawyer is not permitted to practice in a state pursuant to 5.5(d)(2) or another exception, however, then it likely would not be permissible to hold a client trust account in that state.

Advanced Fees: Whose money is it?

Lawyers regularly accept advanced fees from clients, especially at the beginning of a representation, to ensure that they will be paid for their work. A crucial question in managing advanced fees ethically is determining to whom those funds belong. That determination is crucial for a number of reasons. Most importantly, it dictates where the funds will be kept. Any money that belongs to the client must remain in the lawyer's client trust account; any money that belongs to the lawyer should be removed promptly from the trust account and placed in the lawyer's or law firm's account. Bringing the funds to the lawyer's account if they still belong to the client violates the prohibition against commingling in Rule 1.15(a); and similarly keeping them in the client trust account if they belong to the lawyer violates that same rule.[43] The question of who owns the advance fees also affects considerations related to proper handling of funds during disputes,[44] the provision of accurate accountings,[45] and prompt delivery of funds.[46]

Rule 1.15 provides some guidance on the proper handling of advance fees, stating that "A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred." In other words, advanced fees do not become the lawyer's property until they are earned, and therefore cannot be placed in the lawyer's account until then.

Jurisdictions vary widely on whether and how their versions of Rule 1.15 differ from the Model Rule. The majority of jurisdictions follow the Model Rule's language.[47] A variety of court decisions and ethical opinions, however, have held that in many jurisdictions various forms of advanced fees ***do*** become lawyer's property upon receipt. Often, that distinction results more from the terminology of the advance payment than any substantive difference:

- Some jurisdictions hold that fees paid in exchange for a lawyer's future commitment to provide legal services ("advanced payment retainers") or the lawyer's availability to provide legal services for a specific time or specific matter ("general retainer") become the lawyer's property upon receipt.[48]

[43] MR 1.15(a) ("A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.").
[44] Funds that are already the lawyer's property but come under dispute may need to be returned to a separate escrow account if they come under dispute. MR 1.15(e).
[45] An accounting of funds to a client or third party will obviously differ depending on who owns funds. MR 1.15(d).
[46] Delivery of funds owed by a client to third parties, for example, will typically come out of the client's trust account, not the lawyer's. MR 1.15(d) and (e).
[47] ALASKA ETHICS OP. 2012-2 (2012) (flat or fixed fees must be deposited in lawyer's trust account until earned unless agreed otherwise in detailed writing); D.C. ETHICS OP. 355 (2010) (advance fee payment must be placed in lawyer's trust account unless otherwise agreed; in absence of agreement about how lawyer is determined to have earned portions of fixed fee, lawyer has burden of establishing that they earned fees transferred out of trust account); MO. FORMAL ETHICS OP. 128 (2010) ("all flat fees must be deposited into a lawyer trust account and promptly removed when actually earned").
[48] *Dowling v. Chi. Options Assocs., Inc.*, 875 N.E.2d 1012 (Ill. 2007) (distinguishing "general retainers" and "advance payment retainers," which are considered earned upon receipt and placed in lawyer's general account, from "security retainer," which must be placed in client trust account and withdrawn only as services are performed).

- Some jurisdictions hold that fees that do not depend on the amount of time a lawyer spends on the matter ("flat fee payments") become the lawyer's property upon receipt,[49] but the result may depend on the wording of the agreement for the flat fee.[50]
- Some jurisdictions hold that explicit agreements that a fee is "non-refundable" are ethically proper and make the fees the lawyer's property upon receipt,[51] but the majority view appears to be that nonrefundable fees are unenforceable.[52]

There are three important caveats to these exceptions to the general rule. First, it is as crucial as ever that lawyers look to their own jurisdictions' ethics opinions for guidance. Second, even in jurisdictions where the "advanced payment retainer," "flat fee," "non-refundable retainer," or similar agreement is permitted, it must be explicit and transparent, or it risks being invalidated.[53] Third, even where advance fees are permitted, there may still be a requirement under Rule 1.16(d) to refund unearned fees.[54]

Returning funds at the termination of representation

Lawyers must promptly deliver to the client any funds or property to which the client is entitled. Unearned fees or money or other property that the lawyer is holding for the client at the close of the representation must therefore be returned to the client. Rule 1.16 (Declining or Terminating Representation) articulates requirements specific to the return of funds or property, including the client's file, at the termination of a representation:

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as... surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.[55]

Rule 1.16 therefore provides guidance consistent with Rule 1.15 on the return of unearned fees.

But what about situations where an advanced payment has been framed as an "advanced payment retainer," "flat fee," "non-refundable retainer," or similar designation in a jurisdiction that considers these fees to be the lawyer's property?

> *Example: Lawyer practices in a jurisdiction that considers "flat fee" payments to be the property of the lawyer, so long as the retainer agreement explicitly so indicates. Lawyer prepares a flat fee retainer agreement for $2,000 for representing Client in a citizenship application. Client signs the agreement. Lawyer deposits the full payment into their firm's account. After Lawyer has spent minimal time working on the case, Client says they have decided not to apply for citizenship at this time and asks for a refund of the money.*

[49] *In re Kendall*, 804 N.E.2d 1152 (Ind. 2004) (flat fee paid in advance for work regardless of lawyer time becomes property of lawyer upon receipt and need not be held separately).
[50] OR. ETHICS OP. 2005-151 (2005; rev. 2011) (when retaining agreement expressly states fixed fee is earned upon receipt, it may not be deposited in client trust account); NY STATE ETHICS OP. 570 (1985) (holding that advance fee payment need not be deposited in trust account provided but lawyer is obligated to refund any unearned portion of fee);
[51] *See* RESTATEMENT OF LAW GOVERNING LAWYERS §38(g) (presumption that advance fees are a deposit against future services, but non-refundable retainer fees are not prohibited).
[52] *See Iowa S.Ct. Bd. of Prof. Ethics & Conduct v. Apland*, 577 N.W.2d 50 (Iowa1998) (criminal case); *In re Cooperman*, 633 N.E.2d 1069 (N.Y. 1994) (divorce case).
[53] MR 1.5(b).
[54] *See* annotation *infra* for a full discussion.
[55] MR 1.16(d).

Perhaps surprisingly, in this example, Lawyer is very likely required to return the unearned money, in spite of the explicit agreement in a jurisdiction that considers flat fees to be the lawyer's property. In most cases where courts have ruled on this question or state bars have issued opinions, unearned fees must be returned at the termination of representation, even if designated as "nonrefundable" or "flat" fees.[56] In some jurisdictions, if the lawyer started the work before the client terminated the representation, the lawyer can keep that portion of the fees that was actually earned before the termination notice, or the reasonable value of that work if such could be calculated, such as based on any records of the actual time spent.[57]

And what about returning other "papers and property" in the client's file, such as documents, reports, legal memoranda, pleadings, court filings, etc., at the termination of representation? Again, jurisdictions vary in their approach. Most jurisdictions hold that the client is entitled to the entire file.[58] In these jurisdictions, any papers related to the representation must be provided to the client upon request, unless there is a specific exemption.[59] Other jurisdictions use what is termed the "end-product" approach, under which a lawyer is obligated to surrender documents that are the end product of the lawyer's services, but not documents that led to the creation of the end product.[60] Examples of "end product" documents include correspondence by

[56] *See State ex rel. Counsel for Discipline v. Wintroub*, 765 N.W.2d 482 (Neb. 2009) (most courts find nonrefundable fee agreements not invalid per se, but refuse to enforce them on case-by-case basis if fee not earned; collecting cases); *see also Ala. State Bar v. Hallett*, 26 So. 3d 1127 (Ala. 2009) (lawyer who collected $100,000 "flat fee" required to refund half after conceding in post-trial fee petition that $50,000 was "reasonable" fee); *In re Sather*, 3 P.3d 403 (Colo. 2000) (attempt to label fees as "nonrefundable" did not relieve lawyer of duty to return unearned fees upon discharge); *Dowling v. Chi. Options Assocs.*, 875 N.E.2d 1012 (Ill. 2007) (advanced fees already property of lawyer still "are subject to a lawyer's duty to refund any unearned fees, pursuant to Rule 1.16"); *In re Hoffman*, 834 N.W.2d 636 (N.D. 2013) (no Rule 1.5 or Rule 1.15 violation to charge "nonrefundable" "minimum fee" or deposit it in operating account, but lawyer must still refund any unearned portion if fired); *Bd. of Prof'l Responsibility v. Hiatt,* 382 P.3d 778 (Wyo. 2016) (failure to refund unearned portion of "non-refundable flat fee"); MO. FORMAL ETHICS OP. 128 (2010) (Rule 1.16 requires any fee, even flat fee or security retainer, that has become property of lawyer, to be refunded if not earned); Douglas R. Richmond, *Understanding Retainers and Flat Fees*, 34 J. Legal Prof. 113 (2009) ("lawyers cannot escape their Rule 1.16(d) duty simply by labeling fees as earned upon receipt or declaring them non-refundable"). *But see Grievance Adm'r v. Cooper*, 757 N.W.2d 867 (Mich. 2008) (lawyer who retained "minimum fee" after being discharged did not violate Rule 1.16(d) when agreement was clear that fee nonrefundable).

[57] *In re Hoffman*, 834 N.W.2d 636 (N.D. 2013) (calculation of reasonable value of work done before termination used to determine how much of the "nonrefundable" must be refunded as unearned).

[58] *See, e.g.*, *Iowa Sup. Ct. Attorney Disciplinary Bd. v. Gottschalk*, 729 N.W.2d 812 (2007) (failure to return entire file to client violates disciplinary rules); ALASKA BAR ASS'N ETHICS COMM. OP. 2003-3 (2003); ARIZ. FORMAL OP. 04-01 (2004); COLO. BAR ASS'N. FORMAL OP. 104 (1999); D.C. BAR OP. 333 (2005); VA. STATE BAR OP. 1399 (1990). This approach is also advocated by the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS. *See also* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (2000) §46 ("On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.")

[59] *See, e.g., In re Albertsen*, 420 P.3d 1218 (Alaska 2018) (lawyer suspended for failure to turn over client's file to successor attorney); *Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520, (Tex. App.-Houston 2012) (lawyer sanctioned for failure to return client file); *In re Ryan*, 670 A.2d 375 (D.C. 1996) (lawyer suspended after failing to return client documents prepared for trial); ABA FORMAL OP. 471 (2015) ("Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person; materials containing a lawyer's assessment of the client; materials containing information, which, if released, could endanger the health, safety, or welfare of the client or others; and documents reflecting only internal firm communications and assignments." (citations omitted)).

[60] ALA. ETHICS COMM. ADVISORY OP. 1986-02 (1986); ILL. STATE BAR ASS'N ADVISORY OP. 94-13 (1995); KAN. BAR ASS'N OP. 92-5 (1992); MISS. BAR FORMAL OP. 144 (1988); UTAH STATE BAR ASS'N ADVISORY OP. 06-02 (2006).

the lawyer for the benefit of the client;[61] investigative reports and other discovery for which the client has paid;[62] pleadings and other papers filed with a tribunal; and copies of contracts, wills, and corporate records. In contrast, internal memoranda, personal notes, and drafts of final documents need not be turned over to clients in "end product" jurisdictions.[63] If the client has engaged the lawyer to provide a specific product, for example, an opinion on an issue of immigration law, the lawyer may be entitled to retain the fully completed opinion and any associated work product if the client has not paid the fee for this product if non-delivery of the product would not unreasonably harm the client.[64]

What if a lawyer cannot find their client?

Rule 1.15 entails requirements for lawyers to promptly notify their clients upon receipt of funds or property in which the client has an interest, and to promptly distribute funds or property to their clients. But what happens if the lawyer cannot find their client?

> *Example: Lawyer agrees to represent Client in an affirmative asylum application. Client deposits an advance fee of $4,000 in Lawyer's "Client Trust Account," with an agreement that Lawyer will withdraw funds as they earn them or need them for case-related costs. Lawyer works on the case for a few weeks and withdraws $1,500 for fees and expenses. When Lawyer tries to contact Client, however, they cannot reach them. The attorney finds out from Client's roommate that Client has gone back to their home country, and apparently has stated they do not plan to return. What actions does Lawyer need to take with regard to the unearned funds?*

Lawyer first must make reasonable efforts to locate their client. What makes a search "reasonable" will depend on the circumstances, but typically the larger the sum of the funds, or the more valuable the property, the more efforts will be required. Minimal efforts include reaching out by mail to the last known addresses, by phone at known telephone numbers, and by contacting friends, relatives, or business acquaintances of the client.[65] Other, more resource-intensive options include publishing notices in newspapers where the lawyer believes the client is residing or even hiring a private investigator to track down a client's whereabouts.[66]

But what if a lawyer can't find their client; how long and under what circumstances should a lawyer hold onto a client's funds and property? In general, lawyers should keep the client's money in the lawyer's client trust account,[67] and then follow one of two courses of action, depending on the rules of the jurisdiction where the lawyer is practicing. Some jurisdictions allow, or even require, lawyers to follow the state's rules and procedures regarding abandoned property.[68] These procedures may include specific time frames under which the lawyer must act, specific state-run funds in which the property must be deposited, and guidelines on how to handle any earned interest.[69] The other commonly required course of action is to seek judicial

[61] See, e.g., NEB. LAWYER'S ADVISORY COMM. ADVISORY OP. 12-09 (2012); ILL. STATE BAR ASS'N ADVISORY OP. 94-13 (1995).
[62] *See, e.g., Corrigan v. Teasdale Armstrong Schlafly Davis & Dicus*, 824 S.W.2d 92, 98 (Mo. 1992); NEB. LAWYER'S ADVISORY COMM. ADVISORY OP. 12-09 (2012).
[63] ABA FORMAL OP. 471 (2015).
[64] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS (2000) §43.
[65] *See, e.g.*, KY. ETHICS OP. E-433 (2012); NEB. ETHICS OP. 12-07 (2012); D.C. ETHICS OP. 359 (2011).
[66] *See* UTAH ETHICS OP. 97-01 (1997); VA. ETHICS OP. 1673 (1996). Expenses for such more extensive searches can sometimes be charged to client's funds. ID. *But see* CONN. ETHICS OP. 05-19 (2005).
[67] *See, e.g.*, ILL. ETHICS OP. 15-02 (2015); CONN. ETHICS OP. 14-07 (2014); LA. ETHICS OP. 06-RPCC-009 (2006).
[68] *See, e.g.*, PHILADELPHIA ETHICS OP. 2015-1 (2015); KY. ETHICS OP. E-433 (2012); WASH. ETHICS OP. 2176 (2009); LA. ETHICS Op. 06-RPCC-009 (2006); OR. ETHICS OP. 2005-48 (2005).
[69] ID.

intervention. Such rules typically require filing a petition with the relevant state court and obtaining a court order on how to dispose of funds.[70]

As always, the best way to avoid problems of this nature is to have specific language in the representation agreement on how funds and property will be handled if the lawyer cannot, after diligent efforts, locate the client.

C. Hypotheticals

Hypothetical One: I Got Cold Feet, but I Got My Money Back

Sandra was hired to represent a recently married couple in a green card case. John, the U.S. citizen husband, wished to file an I-130 immigrant visa petition for their South Korean wife, Margaret, a university student in the U.S. on an F-1 visa. John and Margaret agreed to pay Sandra the legal fees and government filing fees, which Sandra placed in a client trust account.

Six weeks later, Margaret called Sandra and told them they were moving back to South Korea and asked Sandra not to file the case with USCIS. Margaret told Sandra that Margaret and John had separated, and Margaret begged Sandra to not tell John she was leaving. Margaret also requested a full refund of the advance fee that was paid, all of which was still in the client trust account. Sandra withdrew the funds and refunded them to Margaret.

John eventually found out that Margaret had left and that they had also taken the money they paid to Sandra. John told Sandra that they were the one who supplied the fees and they were angry that their money was refunded to Margaret without their knowledge.

Analysis

Was Sandra required to hold fees received from Margaret and John in a client trust account?

Yes. Margaret and John paid fees at the outset of the case, prior to Sandra performing any legal work. Because Sandra had not yet earned the legal fees, they were required under Rule 1.15(c) to hold the money in a client trust account. Filing fees and funds for other costs that were received in advance of filing should also be held in a client trust account. However, in some jurisdictions such as New York, absent a specific agreement to hold the funds in trust, Sandra should deposit the advance fees and expenses in their operating account.

Did Sandra's actions comply with MR 1.15(c)?

The fact pattern does not state that Sandra had done any work on the case but given that six weeks had passed since the couple engaged Sandra and paid the fees, Sandra had likely begun collecting, reviewing, and analyzing the documents, even if they had not already begun drafting forms. Under MR 1.15(c), Sandra should withdraw their hourly fee from the client trust fund as they perform the work. As they earn the fees,

[70] *See* D.C. ETHICS OP. 359 (2011) (lawyer may be required to seek permission from court to suspend application of unclaimed property law to missing minor client's property until after the client has reached the age of majority); S.C. ETHICS OP. 02-05 (2002) (lawyer seeking to close bank account holding missing clients funds should deposit those funds with the court for safekeeping until unclaimed property laws apply); NASSAU COUNTY (N.Y.) ETHICS OP. 94-22 (1994) (lawyer holding proceeds in escrow who cannot locate client must petition court for order directing disbursement of funds and payment of lawyer's fee).

they should have invoiced Margaret and John with a clearly itemized bill indicating the fees that would be withdrawn from the client trust account.

MR 1.15 does not explicitly state when a lawyer must take funds out of the client trust account if the fees were earned or expenses incurred. However, leaving earned fees in the client trust account longer than a "reasonable time" could result in a violation of the rule. The Rule makes clear that a lawyer shall not leave the lawyer's funds commingled with the client's funds. Sandra should check their jurisdiction's rules regarding what would constitute a reasonable time.

Did Sandra's actions comply with MR 1.15(d)?

MR 1.15(d) states that a lawyer should promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and shall, upon request by the client or third person, promptly render the full amount.

Sandra would have been in compliance with MR 1.15(d) only if an acknowledgement that the funds were solely Margaret's property was clearly spelled out in the fee agreement. In that situation, if Sandra had not yet started working on the case, and the money was still in the client trust account, Margaret was entitled to receive a full refund. However, if the funds were not solely Margaret's property, then Sandra could not deliver them to Margaret without first determining what portion of the funds Margaret was entitled to receive and what portion John was entitled to receive. Once Sandra knew that amount, Sandra would need to deliver to each of the co-clients the amount to which each of them was entitled.

Did Sandra's actions comply with MR 1.15(e)?

No, if the money used to pay the advance fee was the property of both John and Margaret.

MR 1.15(e) specifies that, when there is a dispute as to entitlement of funds in the client trust account, the amount in dispute must be held in trust until the dispute is resolved. Here, we will assume that John has equal claim to the advance fee that was paid to Sandra. This is a situation in which there is likely to be a dispute about who should receive the refund. By withdrawing the funds and giving the check to only Margaret before settling the dispute between John and Margaret, Sandra has violated MR 1.15(e).

A common misconception is that the dispute may be resolved by splitting the refund equally to the parties involved or back to the credit card that was used. Under the rule, in case of a dispute, the fee cannot be returned – it must remain in the client trust account until the dispute is resolved.

Did Sandra violate any other Rules?

In this dual representation, Sandra would need to consider MR 1.7 regarding conflict of interest. When Margaret asked Sandra to keep information from John, Sandra was placed in a difficult situation. Under MR 1.6, Sandra could not breach their duty of confidentiality to Margaret by telling John, unless Sandra has a conflict of interest clause in their fee agreement stating that there will be no confidences between jointly represented clients. If Sandra returns the funds without consulting John, they may have breached their MR 1.4 duty of communication to John by returning their joint money to Margaret without John's knowledge. The best practice would be for Sandra to have spelled out in the fee and engagement agreement how any conflicts of interest would be handled. If they had not done so, however, they should have withdrawn from the representations as soon as Margaret asked them not to tell John Margaret was leaving John, and referred Margaret and John to separate lawyers.

Hypothetical Two: A New York Lawyer Moves to Maine

Attorney Anjali Gupta is admitted in New York but practices immigration law in Camden, Maine, through her own firm. Anjali previously maintained a small law office in New York for ten years, but moved to the scenic Maine coastal town of Camden with her children after the coronavirus pandemic impacted New York in March 2020. When Anjali established their law practice in Maine, they took pains to indicate in all their communications that their practice was limited to federal immigration law and that they were only licensed in New York. At this point, Anjali has bought a home in Camden and has dedicated space within the home for their law office.

Anjali continues to work on matters as before on behalf of clients who are based in New York, as well as other parts of the country through remote work. After Anjali opened their office in Camden, a large Maine-based lobster company expressed interest in engaging Anjali to process H-2A visas.

Anjali usually accepts flat fees for immigration cases. Each time Anjali receives a fee in advance for starting work on a case, they deposits the fee in their operating account in a New York branch of a national bank, as they had been permitted to do under New York's version of Rule 1.15. Anjali's standard engagement agreement clearly indicates that the client fees will be deposited in their operating account, and any unearned fees will be refunded to the client.

What ethical considerations affect Anjali's determination on how to manage their operating account?

Analysis

The initial question is whether Anjali is even permitted to practice law in Maine. Here, Anjali will likely be able to practice immigration law in Maine, even though they are only admitted in New York. Rule 5.5(d)(2) allows a lawyer admitted in a different jurisdiction to provide legal services that they are authorized to provide by federal or other law.[71] Here, because Anjali is authorized to practice in New York, they can provide immigration-related legal services under federal law in Maine as well.

Although Anjali will likely be able to practice in Maine if their practice is exclusively limited to federal immigration law, they will be subject to the jurisdiction of both Maine's Rules of Professional Conduct and New York's Rules of Professional Conduct pursuant to Rule 8.5.[72] The practical challenge, then, is how Anjali can navigate the rules of the two jurisdictions.

The most important practical question for Anjali is where they can set up her trust account. New York law does not require Anjali to set up a trust account. However, although Anjali may be practicing exclusively federal immigration law in Maine, they still are subject to Maine's rule requiring them to maintain an IOLTA account in "…a bank, trust company, savings bank, credit union, or savings and loan association authorized by federal or state law to do business in Maine, the deposits of which are insured by an agency

[71] *See* Maine Rules of Professional Conduct 5.5(d)(2). Even if this exception did not exist under Maine's local rule or another state's rule, *Sperry v. Florida*, 373 U.S. 379 (1963), ought to preempt any state limitation to federal practice**.** In addition, 8 CFR §§ 292.1(a)(1) and 1.1(f) provide that "a member in good standing of the bar of the highest court of any State, possessing territory, Commonwealth, or the District of Columbia, and is not under any order of any court suspending, enjoining, restraining, disbarring or otherwise restricting him in the practice of law" is authorized to represent a person before the relevant federal agencies responsible for enforcing federal immigration law.

[72] It is important to note that there may be rules outside a state's rules of professional conduct that a lawyer is obligated to follow. In Maine, for example, there are "Maine Bar Rules" that supplement the "Maine Rules of Professional Conduct," which create additional obligations for lawyers practicing in Maine. *See* Maine Bar Rule 6(g), available at https://mebaroverseers.org/regulation/bar_rules.html?id=638764.

of the federal government, and which has been designated by the Maine Justice Foundation as an eligible institution".[73] Because of Maine's requirement for lawyers to place advance fees into such an account, Anjali would need to have such an account, and could hypothetically establish it in Maine or New York, so long as it met the criteria of Maine's rule.[74]

Anjali must navigate other differences in the two rules. For example, while New York requires advance fees (and even expenses) to be deposited in the lawyer's operating account unless the lawyer and client have agreed otherwise, Maine requires advance fees to be deposited in the trust account and to be withdrawn only when the fees are earned and expenses incurred. Anjali can follow both rules, because although New York has a requirement of depositing advance fees in the lawyer's operating account,[75] the lawyer and client may nevertheless agree to deposit the advance fees in a trust account, which would be consistent with the rules of New York and Maine. In addition, while Maine requires that the trust account be maintained with a banking institution that is authorized to do business in Maine,[76] New York requires that the trust account be maintained in a banking institution located in New York State. Again, Anjali can follow both rules – because New York allows out-of-state banks to be used with the prior and specific written approval of the client or other beneficial owner of the funds. Obtaining that consent would allow Anjali to use a bank located in Maine. As a third example, in all cases, New York lawyers can only use banks that have agreed to furnish "dishonored check notices" pursuant to statewide court rules.[77] Therefore, any bank Anjali uses in Maine would need to have that practice.

Hypothetical Three: Dancing to Earn My Fees

Hailey was hired to represent Chan Dance Company and their Hong Kong-born internationally recognized dancer, Mandy, in filing an O-1 petition, so that Mandy could perform for and teach at the dance school. The company agreed to pay an advance flat fee for filing the O-1 petition with USCIS.

The company sent a check for the advance flat fee to Hailey, who promptly informed their billing manager, Ethan, to deposit the amount into the client trust account. Once the money was deposited in the trust account, Hailey informed the company that the fees had been received and deposited into the trust account.

A few weeks later, Hailey researched the history and art of Mandy's specific dance style and gathered additional supporting documentation. The preparation took a considerable amount of time and Hailey instructed Ethan to move one-third of the company's flat fee into the firm's operating account, which he

[73] *See* MAINE BAR RULES R. 6, available at https://mebaroverseers.org/regulation/bar_rules.html?id=638764. *See also Matter of Ziankovich*, 180 A.D.3d 140 (1st Dept. 2020) (Affirming disciplinary sanctions against attorney, by New York ethics governing body, for violating Colorado rules by not depositing advance fees in trust account).
[74] Under New York Rule 8.5(b)(2), and the guidance provided by N.Y.S. BAR ASSOC. OP. 1058 (2015), New York will likely apply Maine's rule regarding depositing fees in a trust account as Anjali's setting up of their practice in Maine has a predominant effect in that jurisdiction. *See* N.Y.S. BAR ASSOC. OP. 1058 (2015) (if a lawyer is admitted solely in New York but is authorized by Federal law to practice immigration law in another state, and if the lawyer practices only immigration law and practices only in another state, then the lawyer is not required to maintain an attorney trust account in a New York banking institution unless the other state's Rules of Professional Conduct require the lawyer to do so). This opinion is available at https://nysba.org/ethics-opinion-1058/
[75] *See* N.Y.S. BAR ASSOC. OP. 816 (2007); *see also* Devika Kewalramani and Jordan Greenberger, *Advance Payment Retainers: Whose Property? What Amount?* (N.Y.L.J. Feb. 15, 2013).
[76] *See* MAINE RULES OF PROFESSIONAL CONDUCT 1.15(b)(4).
[77] *See* ATTORNEY TRUST ACCOUNTS AND RECORDKEEPING – A PRACTICAL GUIDE, THE NEW YORK LAWYERS' FUND FOR CLIENT PROTECTION OF THE STATE OF NEW YORK, January 2015, available at http://www.nylawfund.org/2015%20Practical%20Guide.pdf

promptly did. Hailey felt moving one-third of the flat fee was appropriate in the preparation of the O-1 petition.

A few days later, Ethan quit unexpectedly. After a few rounds of interviews, Hailey hired Kyle to be the new billing manager. Kyle, who was unfamiliar with client trust accounts, moved the remainder of the flat fee and costs from the client trust account to Hailey's operating account.

One week later, Chan Dance Company contacted Hailey and informed them that they were canceling the O-1 case. The company lost Mandy to a prestigious dance company in Australia. Frustrated, the company demanded that all their advance fee be returned. Hailey refused, stating that they had spent countless hours on the case, and as such, the time spent on the case would be billed on an hourly basis. The remaining difference between the time-based invoice and advance flat fee would be returned to the company.

Analysis

Did Hailey violate MR 1.15(c) when Kyle transferred the flat fee from the client trust account to Hailey's operating account?

Initially, Hailey complied with Rule 1.15(c) when they moved one-third of the fees from the client trust account to their operating account as they performed work, although best practices would be to ensure such milestones were clarified in the engagement letter, and that the client was notified of the transfer. As for the remaining portions that Kyle transferred to the operating account, the answer will differ based on the jurisdiction.

Jurisdictions which have adopted the Model Rule version of 1.15(c), such as Kansas, Oklahoma, and Texas, do not distinguish between flat fees and hourly fees received as security retainers. In those jurisdictions, all fees paid in advance, whether flat fee or hourly, must be placed into a client trust account and can only be withdrawn as fees are earned or expenses incurred. Kyle's transfer of the remainder of Chan Dance Company's advance fee to the operating account before the fees were earned would be in violation of Rule 1.15(c).

In other jurisdictions, such as California, New York, and Massachusetts, advance flat fees can be considered earned when received if other provisions of Rule 1.15 are complied with, and may be deposited directly to the lawyer's operating account. In those states, Hailey would not be in violation of Rule 1.15(c). However, there may be specific requirements for fee agreements and record-keeping and thus it is critical that the lawyer carefully study the relevant jurisdiction's rules and the comments.[78]

How should Hailey handle the refund to the Chan Dance Company from funds in their operating account?

Very carefully! Because the advance fees are now in dispute, Hailey must keep the disputed portion in the client trust account.[79] They should also suggest means for a prompt resolution of the dispute.[80] In addition,

[78] For example, in California, Rule 1.15 permits a flat fee paid in advance for legal services to be deposited into an operating account, but only if the lawyer discloses to the client in writing that they have a right to require that the flat fee be deposited into a trust account until earned, and that the client is entitled to a refund of any unearned amount of the fee in the event the representation is terminated or the services for which the fee has been paid are not completed. Further, if the amount of the flat fee paid in advance exceeds $1,000, the client's consent must be in writing.
[79] MR 1.15, Cmt. 3.
[80] Id.

regardless of whether Hailey practices where the advance flat fees must be kept in a client trust account or where advance fees may be deposited directly to an operating account, Hailey is required to keep account of the amount of work performed. Hailey should review the billed hours to the case to confirm the exact amount of time spent on the case so far. Hailey should calculate the hourly rate for those fees and determine the remainder of the advance to be refunded to the Chan Dance Company. Any portion not in dispute should be returned to Chan Dance Company. Once the remainder has been determined, they should discuss next steps and intentions with the company before proceeding.

Was it wrong for Hailey to require that the time spent on the case be billed on an hourly basis?

No. Comment 3 to Rule 1.15 states that the lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. Hailey and their team had performed significant work on the O-1 petition. These cases require a significant amount of research, writing, and drafting and it was reasonable for Hailey to request that the amount of time spent on the case be calculated as a time-based fee.

However, although Hailey was entitled to the fees that they reasonably believed they were owed, they cannot keep any fees in the firm's account that are in dispute. In addition, it would have been impermissible for Hailey to hold funds owed to the Chan Dance Company in order to coerce them into accepting their contention.[81] As noted above, the undisputed portion of the funds should be promptly distributed, and if the company ultimately continues to dispute Hailey's plan to return remaining legal fees after a time-based calculation is conducted, then Hailey would need to keep the accrued time-based fees in the client trust account until the dispute is resolved.

Hypothetical Four: Pay Attention to That Trust Account!

Tamarind is the managing partner of a small law firm. They have a lawyer trust account and a wonderful bookkeeper, Kayla, in their firm who keeps it up to date. Kayla does the books every month, balancing the account and creating client ledgers that show each client's running balance. One day, Kayla brings the client ledgers to Tamarind and says, "Time for your review." Tamarind responds "I know you did it right. Can you just put it on my desk and I'll get to it later?" Kayla does so and a couple of weeks pass. Eventually, Kayla gets tired of getting little feedback from Tamarind and she also suspects that Tamarind isn't really reviewing the ledgers. She brings her concerns to Tamarind, who says, "Kayla, you are awesome. I know you get it right every month. You don't need my oversight." Kayla is flattered but concerned that Tamarind is not paying adequate attention to account fees incurred from their trust account bank, and feels only Tamarind is authorized to pay for the bank fees incurred.

Are Kayla's concerns about the bank fees and Tamarind's lack of oversight justified?

Analysis

As an initial matter, lawyers are permitted to deposit personal funds or funds from the law firm into trust accounts to pay bank fees and charges; such deposits are explicitly exempted from the prohibition on commingling funds.[82] Those deposits should not be larger than what is reasonably necessary to pay the

[81] Id.
[82] MR 1.15(b).

charges.[83] As always, it is preferable, and in some jurisdictions required, to put in writing agreements about responsibility for any fee arrangement.[84]

The real problem here is with Tamarind's lack of oversight. Kayla is a "non-lawyer assistant" at Tamarind's firm, and Tamarind (and in some states, like New York, the firm itself) is therefore responsible for Kayla's actions pursuant to Rule 5.3. Tamarind must make reasonable efforts to ensure Kayla's conduct is compatible with a lawyer's professional obligations and Tamarind will be responsible for any conduct of Kayla's that would be an ethical violation for a lawyer if the lawyer knew about or ordered the conduct.[85] Here, although Tamarind is permitted to delegate bookkeeping responsibilities to Kayla, Tamarind is still ultimately responsible for compliance with all account-related responsibilities.[86] Tamarind's apparent lack of review of the accounting work here appears to be creating a risk that Kayla is not complying with the trust accounting rules, including the specific risk that bank fees are not being paid for the client trust accounts. If the firm's arrangement with clients is that bank fees will be paid for by the firm, then any failure to keep the accounts in good standing will violate the firm's fiduciary duty to those clients. If this is an IOLTA trust account, or course, then the client should not need to be paying any bank fees.

Hypothetical Five: Automatic Payment Deposit System and the Missing Client

Satya is a sole practitioner and subscribes to a comprehensive payment and client management application called NowPay for their law firm. NowPay allows for payment deposit management that is linked to the law firm's bank deposit accounts. NowPay sends an automated monthly billing hours invoice information regarding balances and remainders to the client by email. Once the client executes a representation agreement and a payment plan is arranged, the client enrolls in automatic payments and provides consent through NowPay. Satya has separate bookkeeping and payroll software. Accounts receivable and payable in the payroll software are reconciled with the law firm's bank deposit statements.

[83] *See, e.g., In re Yacobi*, 811 S.E.2d 791 (S.C. 2018) (depositing more personal funds than necessary to cover trust account shortages and fees and failing to remove overage); L.A. CNTY. ETHICS OP. 485 (1995) (lawyer may keep personal funds in trust account to pay bank charges if amount bears reasonable relationship to amount of charges expected, but not as buffer against possible overdrafts in trust account, whether overdrafts caused by bank or lawyer error); MD. ETHICS OP. 00-18 (1999) (law firm may deposit funds in trust account to cover bank charges for returned checks, or may arrange for charges to be deducted from firm's operating account); R.I. ETHICS OP. 93-57 (1993) (lawyer may deposit own monies in trust account to avoid service charges, as long as amount is minimum necessary to avoid charges and lawyer does not use funds for any other purpose).

[84] *See, generally*, MR 1.5.

[85] MR 5.3.

[86] Id. *See also In re Bailey*, 821 A.2d 851 (Del. 2003) (managing partner of firm failed to prevent firm bookkeeper's improper withdrawal of client funds from trust); *In re Robinson*, 74 A.3d 688 (D.C. 2013) (lawyer should have carefully monitored subordinate tasked with trust account administration after first overdraft and should have removed subordinate after second overdraft); *In re Peloquin*, 338 P.3d 568 (Kan. 2014) (failure to supervise office manager); *Att'y Grievance Comm'n v. Sperling,* 185 A.3d 76 (Md. 2018) (sole signatory on firm client trust account failed to review account records or perform monthly reconciliations and therefore was unaware that his employer, a suspended lawyer, had misappropriated client funds); *In re Montpetit*, 528 N.W.2d 243 (Minn. 1995) (lawyer should have known secretary improperly maintained trust account books and records; lawyers charged with knowledge of requirements for handling client funds); *State ex rel. Okla. Bar Ass'n v. Mayes*, 977 P.2d 1073 (Okla. 1999) (lax supervision of nonlawyer office manager allowed commingling and conversion); *In re David*, 690 S.E.2d 579 (S.C. 2010) (delegating accounting of client trust account to single, untrained, nonlawyer employee); *In re Light*, 615 N.W.2d 164 (S.D. 2000) (leaving management of firm trust account to associate and clerical staff, allowing unearned fees to be taken out of trust); *In re PRB No. 2013-145*, 165 A.3d 130 (Vt. 2017) (firm's failure to reconcile IOLTA account or keep records discovered after bookkeeper suddenly left).

Elon retains the law firm for a legal matter and enrolls in automatic payments. Elon is an engineer who builds a spaceship that takes them to the moon. They like it on the moon andabandon their work, apartment, and commitments to live on the moon and are never heard from again. Satya has attempted to communicate with Elon using all of their known contact information. Mail is undeliverable and Elon's phone line is disconnected. Satya is unable to continue to effectively represent Elon in their legal matter and is forced to terminate representation and to discontinue the legal matter initiated.

Satya notices that Elon has a remainder on their account due to being enrolled in automatic payments on NowPay. What should be done with Elon's remainder?

Analysis

Upon termination of the representation, Satya is required to return any unearned funds to Elon.[87] Satya is also required to make reasonable efforts to locate Elon.[88] Reasonable efforts typically include, at a minimum, trying to reach a client by mail and telephone, and by contacting the client's family or business associates. In some circumstances, reasonable efforts may also include publication in local newspapers, checking telephone company records, and hiring a private investigator. If Satya is unable to locate Elon after reasonable efforts, then the unclaimed funds should be disposed of according to the applicable rules of their jurisdiction. As always, including a provision in the retainer agreement to address a "missing client" scenario would save Satya a lot of headaches.

The original payment arrangement through NowPay is permissible, so long as it comports with Rule 1.5's reasonableness requirements. Again, putting the fee agreement in writing, which is required in some jurisdictions, would avoid possible problems and disputes later in the representation. If the NowPay deposits are advance payments, then they need to go into the client trust account until they are earned. Credit card advance payments are also permissible, so long as any credit card costs or chargebacks do not come from other clients' funds in the trust account.

Hypothetical Six: Using Up Client Deposits

Sal is a removal defense attorney in Washington State. Over the years, they have prided themselves on representing respondents at immigration courts throughout the United States. Sal's standard fee agreement is a flat fee for legal fees, which also has a travel retainer built in. Jessica, who is a native and citizen of New Zealand, hires Sal in January 2020 for a complicated removal case in New York. Sal is very excited to take the case, as it means that they can spend time in New York after the hearings. They set their fee agreement as a flat fee as follows:

- Legal fees, which include up to two master calendar hearings and one individual hearing at the immigration court in New York, New York.
- Travel fees, which include air travel, hotel, transportation, and other expenses to be paid 60 days in advance of the hearing.

Jessica pays both legal and travel fees for a case set in March 2020. Unfortunately, COVID-19 hits and the courts are shut down. Jessica, fearing for their safety in the United States, decides to self-deport and return to New Zealand. In May, Jessica requests their retainer back from Sal, but unfortunately Sal deposited the travel and legal fees to their operating account and is unable to provide a refund as they have used up the money to pay their outstanding bills.

[87] MR 1.15(d).
[88] See discussion, *supra*, in Annotations and Commentary section on Missing Clients.

Has Sal violated Rule 1.15?

Analysis

Yes, Sal has violated Rule 1.15 by mixing ***travel*** fees that are as yet unearned, and therefore still Jessica's property, with the firm's funds in the operating account. The fact that the payment is a flat fee does not affect the fact that a violation has occurred.

The question of whether placing the ***legal*** fees in the operating account is a violation is more complicated. In Washington State, where Sal's firm is located, if specific language is included in the fee agreement, then flat fee payments for legal fees can be deposited in the lawyer's account.[89] Of course, even if it is permissible to deposit those legal fees in the firm account, as is the case in New York,[90] Sal still has to return any unearned portion. Here, while Sal may be able to claim some of the flat fee amount if they have engaged in some work on the case, they clearly have not earned all of it since they have not attended any hearings on the case. They therefore will have to refund the unearned portion in a prompt manner.

Hypothetical Seven: Depositing Lawyer's Own Funds into Trust Account

Lawyer Matilda has just opened a new practice doing family-based visas. They opened up both an operating and a trust account at their local bank. Knowing that any mistake in their trust account that resulted in an overdraft would mean the bank would automatically report them to the state bar, Matilda decided that they would deposit $500 of their own money into the trust account, so that they never would risk an overdraft.

Has Matilda violated Rule 1.15?

Analysis

Yes, although their intentions are good, Matilda has likely violated Rule 1.15. Rule 1.15(b) allows lawyers to deposit their own funds in a client trust account, but only in an amount necessary to pay bank service charges. Some banks charge service fees for trust accounts. If the lawyer does not deposit a small amount of their own money to cover the service fee, it could result in an overdraft and reporting to the state bar. This in turn could lead to a trust account audit, which can be a difficult and stressful event for the lawyer. Matilda would not have violated Rule 1.15 if they had deposited an amount that was enough to cover the bank service fees, but not much more. For example, if the service fee each month was $10.00, they could have deposited either that amount or a small amount more; depositing $500 is excessive and could result in a Rule 1.15 (b) violation.

[89] Wash. R. Prof. Conduct Rule 1.5(f)(2) ("A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer's property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer's property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client's right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed.").
[90] NY STATE ETHICS OP. 570 (1985).

Hypothetical Eight: Notice to Clients Regarding Trust Account Activity

Mustapha manages a small immigration practice in Seattle. After years of exclusively using flat fees for their immigration practice, Mustapha became frustrated by the long delays in the adjudication of applications and cases and the increasing prevalence of rejections and RFEs. In January 2019, they decided to switch to using hourly fees. In Washington state, lawyers are permitted to deposit flat fees into their general account, so Mustapha rarely used their trust account. Occasionally, they would receive cost payments in advance from clients that they would deposit in their trust account.

When they switched to using hourly fees, Mustapha decided that they would require all their clients to provide them with an advance deposit to assure that they would be paid and not get left hanging if their clients did not pay their bills. Mustapha read Model Rule 1.15 and Washington Rules of Professional Conduct 1.15A and 1.15B and felt confident they understood the Rules. They had used a bookkeeper for several years to handle billing and accounting. The bookkeeper worked with other small businesses but their only law firm client was Mustapha Law. The bookkeeper told Mustapha that there was no need to start billing clients until the advance deposit was used up because they would not owe anything until that time.

In June 2019, Client Jan hired Mustapha to represent them in their affirmative asylum case. Mustapha explained to Jan that they would require an "advance fee of $5,000." Mustapha told Jan that Jan would be charged hourly at a rate of $300 per hour, and that before they filed their I-589 Mustapha would need to review their file and prepare a summary of their possible claims. Mustapha told Jan this would take a few months as they needed to obtain judicial records from Belarus to verify Jan's claim, which would take at least several weeks. Mustapha did not have a written fee agreement with Jan. They did not think they needed one as hourly fee agreements do not have to be in writing under the Washington Rules of Professional Conduct.

In June 2019, Mustapha spent 1.5 hours on Jan's case researching how to obtain records from Belarus. At the end of June, Mustapha transferred $450 from their trust account to their general account. In July 2019, Mustapha spent three hours reviewing Jan's file and transferred $900. In August 2019, Mustapha spent one hour reviewing the records they received from Belarus and transferred $300. Per Mustapha's bookkeeper's advice, they did not provide Jan with any bills or statements.

In mid-September 2019, Jan called Mustapha and said they had met with another lawyer closer to Jan's home city of Spokane and wanted their file transferred. Mustapha told Jan they would return $3350 of the advance payment. Jan told Mustapha they had no idea he had spent so much of the deposit, that Mustapha had not even filed the application, and that Jan intended to file a bar complaint against them if they did not return the full deposit.

Did Mustapha comply with Rule 1.15 in their handling of funds in trust? If not, what should Mustapha have done differently?

Analysis

While Mustapha technically complied with Model Rule 1.15, they did violate Washington State's version of the Rule. Either way, they could have done much more to avoid the complications and potential embarrassments of an ethics complaint being filed by their client.

Model Rule 1.15(c) allows a lawyer to withdraw fees or expenses from an advanced fee payment, but only if the advanced fees are deposited in a client trust account. Mustapha put Jan's advanced fees in a client trust account, and only withdrew funds as they were earned. There is no explicit requirement in the Model

Rule or comments that requires Mustapha to notify Jan as they withdraw funds from the trust account. Washington Rule of Professional Conduct 1.15(c), however, states that "the lawyer may withdraw earned fees only after giving reasonable notice to the client of the intent to do so, through a billing statement or other document."[91]

Equally important, Mustafa could have avoided their fallout with Jan with a written fee agreement explaining their monthly billing process. including how advance trust deposits are treated and when they are considered earned. Further, they could have provided regular accountings so Jan was more aware when funds were being withdrawn. Mustapha certainly should not have relied on their bookkeeper, who was inexperienced in handling trust account issues for lawyers, regarding how often to bill clients.

Hypothetical Nine: Where Should Lawyers Go to Find Their States' Requirements for Use of Trust Accounts?

Elena lives in Washington D.C. They just opened their immigration practice. Their first client agrees to pay a flat fee of $1,000 to prepare and file an I-130. Elena would like to deposit the flat fee in their operating account. They are starting their practice and need the cash. However, they don't know if that is allowed. They review the D.C. Rules of Professional Conduct, but the rules do not clarify how an advance flat fee should be treated. Elena wrings their hands, wondering why the rules would not cover such a basic issue.

Given that the DC RPC do not provide them with an answer, where can Elena turn? What kind of research should they do?

Analysis

In most jurisdictions, the highest court of the state or territory hears appeals in matters involving lawyer discipline and issues binding decisions interpreting the local Rules of Professional Conduct. In D.C., the highest local Court is the District of Columbia Court of Appeals (which is to be distinguished from the D.C. Circuit Court of Appeals). Elena could do an electronic search of its opinions, perhaps inputting search terms like "flat fee" and "trust account." Elena would discover that the D.C. Court of Appeals has addressed this very issue, holding that, absent the client's informed consent to treat the advance flat fee otherwise, it must be deposited in the Attorney's Trust Account.[92]

Another excellent source of information is state (and sometimes city) bar association ethics advisory opinions. These tend to flesh out some of the "gray areas" of the Rules of Professional Conduct, often based on inquiries received from practitioners. These opinions have become increasingly accessible and can often be found on Bar or Court websites. If Elena did a Google search for D.C. Ethics Opinions on flat fees, they would be directed to a D.C. Ethics Opinion expounding on the D.C. Court of Appeals decision.[93] To double-check their research, Elena could investigate if the D.C. Bar has an ethics hotline and present their hypothetical to an ethics specialist or join a local listserv and pose their question there. And, finally, some jurisdictions have trust account guides that interpret the rules, list ethics opinions, etc. Reviewing a current

[91] WASH. R. PROF. CONDUCT R. 1.15(c). *See also* WASH. R. PROF. CONDUCT R. 1.15A(e) ("A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds.") Washington State is not the only jurisdiction with an explicit requirement to notify the client when advance fee funds are withdrawn. *See, e,g*. MICH. ETH. OP. R-0007 (1990) ("Advances of attorney fees must be deposited into the trust account and may not be withdrawn until the fee is earned and the client is provided an accounting.").
[92] *See In re Mance*, 980 A.2d 1196 (D.C. 2009).
[93] *See* D.C. ETHICS OP. 355 (2010).

version can help the lawyer avoid missing important laws, rules, and opinions that are outside the state's rules of professional conduct.

Hypothetical Ten: The Client Bonus

Mary has a thriving practice in Yakima, Washington. They have completed several cases but have not moved money from their trust account to their operations account in a few months. They have also not provided their clients with statements, as they do not owe any money.

Mary is very happy, because their best client told them to keep the extra $5000 in trust that was due to be returned to the client, as a bonus for doing a good job on the case. Mary is not sure what to do, so just keeps the $5000 in their trust account.

In addition, Mary likes to keep $500 of their own money in their trust account so that it never goes below zero.

Has Mary violated any ethics rules?

Analysis

There are three questions at play in this scenario: (1) Is it a problem that Mary is not promptly moving money from the trust account to their operations account, nor providing statements to their clients? (2) What actions, if any, should Mary be taking regarding the extra $5000 from their client? (3) Is it a problem that Mary is keeping $500 of their own money in the client trust account?

With respect to the first question, assuming that there is no dispute about the fees Mary earned, then those funds are theirs and should not be in a client trust account, as that will constitute impermissible commingling of funds. They should be promptly shifting those funds to their operating account.[94] In addition, while Rule 1.15 does not require the provision of statements, notifications or accountings to clients except where the client requests it, Washington State, where Mary is practicing, does have such a requirement.[95] Pursuant to Washington State's version of Rule 1.15, Mary should be providing a statement to their client both when they shift any of the funds, and on an annual basis even if there is no shifting of funds.

With regard to the extra $5000, if the client wants to provide Mary a bonus for extra work performed, then Mary should send the client a written statement for the actual work performed prior to transferring the money from their trust account to the operating account. If the bonus was because the client was pleased due to the attorney doing a good job, this money still belongs to Mary and they can move it to the operating account by acknowledging to the client that it was an extra bonus.

Finally, Mary should only keep their own funds in the trust account to the extent necessary to cover bank charges.[96] Keeping more than the funds necessary will result in an impermissible commingling of funds.

[94] MR 1.15, Cmt. 3.
[95] WASH. R. PROF. CONDUCT R. 1.15A(e) ("A lawyer must promptly provide a written accounting to a client or third person after distribution of property or upon request. A lawyer must provide at least annually a written accounting to a client or third person for whom the lawyer is holding funds.")
[96] MR 1.15(b).

D. State Variations of Model Rule 1.15

As noted throughout this chapter, one of the most challenging aspects of adhering to the ethical responsibilities regarding safekeeping property is that state adaptations of Model Rule 1.15 vary widely, and often carry highly specific guidance that is unique to that jurisdiction. The most important takeaway from those facts is that lawyers must always look at the rule adaptation in their jurisdiction for guidance when assessing how to act ethically with respect to safekeeping property. Making this particular set of ethical issues even more complex, and as referenced throughout this chapter as well, important guidance on fiduciary duties comes not just from the ethical rules, but also from other court rules and IOLTA rules specific to each jurisdiction. Due to these wide and highly detailed variations, noting every state's variation on the Model Rule in this chapter would not be practical. In order to access current information on a specific state's rules, we instead urge lawyers to the following AILA site: https://www.aila.org/practice/ethics/ethics-by-state.

American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.16
Declining or Terminating Representation

Sherry K. Cohen, Reporter

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MODEL RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

Introduction

For many lawyers, withdrawal from representation may seem like a quick and easy way to get away from a problem client. Immigration lawyers—and those in other practice areas—know full well that every once in a while they can make the mistake of agreeing to represent the wrong client. Sometimes a lawyer makes a good faith mistake by agreeing to represent the client in a matter that turns out to be beyond his competency or requires so much time and effort that the representation places an unreasonable financial burden on the lawyer. Some clients present problems because they are unable to pay the lawyer's fee or choose not to pay. Others may refuse to take the lawyer's advice and insist on a course of conduct the lawyer believes will be detrimental to the client's interests. There are clients that are abusive to the lawyer or her office staff, or engage in conduct the lawyer finds repugnant.

Lawyers who are unfamiliar with Model Rule (MR) 1.16 (governing withdrawal) might believe that as long as they advise the client of the withdrawal and provide copies of key documents they have behaved in an ethical manner. Others may believe that, except when clients discharge their lawyers, withdrawal is always discretionary. Some may believe that once the representation is terminated the lawyer has no further obligation to that client.

However, any lawyer who believes the above would be wrong. In the first instance, MR 1.16 sets forth specific circumstances under which withdrawal is mandatory and those in which withdrawal is optional. MR 1.16 also sets forth the lawyer's obligations upon termination based on the lawyer's reasonable duty to protect client's interests. As a practical matter, MR 1.16 should be read as a road map that protects the interests of both the lawyer and client. When a lawyer understands the grounds for withdrawal under MR 1.16, he is more likely to be successful when he seeks permission to withdraw from a tribunal. Although it should not be the primary reason for familiarity with MR 1.16, lawyers who ignore the rule may face discipline for improper withdrawal even if they have otherwise provided proper representation.

In presenting a comprehensive analysis on certain ABA Model Rules of Professional Conduct with the immigration lawyer in mind, the AILA Ethics Compendium (EC) started with candor toward a tribunal under MR 3.3 which essentially requires a lawyer to prevent a fraud on the tribunal either from her own or the client's submission of false evidence. The second EC chapter covered the duty of confidentiality under MR 1.6. We then dealt with the basic issues of competent representation under MR 1.1 and diligent representation under MR 1.3. In each of these sections, we referred to, but did not elaborate, on situations in which a lawyer was ethically obligated to withdraw or, at the least, had the option to withdraw under MR1.16. We present a comprehensive analysis of this rule now.

We begin by providing the applicable EOIR/DHS rules, the text of MR 1.16 and the official comments and Chapter 2.3 of the Immigration Court Practice Manual.[1] We will explain key terms used in MR 1.16 and then address each sub-section with annotations and commentary, including citations to ethics opinions and disciplinary decisions. We do not discuss malpractice cases because few, if any, malpractice cases involving immigration lawyers address improper withdrawal as a distinct aspect of negligence.[2]

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[1] *See Immigration Court Practice Manual*, Ch. 2.3 concerning withdrawal and substitution of counsel appearing before immigration courts and BIA, Appendix, A.

[2] We refer readers to Ethics Compendium (EC) No. 3, MR 1.1 (competence) and EC No. 4, MR 1.3 (diligence) for a review of representative malpractice cases against immigration lawyers.

In addition, because some state's withdrawal rules vary from MR 1.16, we will provide a summary of state variations. Lastly, we will provide and discuss various immigration law hypotheticals involving withdrawal from representation.

Prudent and conscientious lawyers should always carefully review their home state's professional responsibility rules, and in particular, their state's version of any model rule cited in the Ethics Compendium.

The first section covers circumstances under which a lawyer *mus*t decline representation in the first instance or withdraw at a later time.

Grounds for Mandatory Withdrawal

MR 1.16(a) identifies three circumstances that require the lawyer to either decline representation or withdraw. MR 1.16(a)(1) requires a lawyer to withdraw if the representation will cause the lawyer to violate rules of professional conduct or other law. This is logical. A lawyer should not be forced to violate rules of conduct or other law merely to satisfy or keep his client. In addition, because lawyers, as they age or for other reasons, may have a physical or mental condition that impairs their ability to provide diligent and competent representation, MR 1.16(a)(2) requires that a lawyer decline or withdraw from the representation if that is the case. It would be grossly unfair to the client to be represented by a lawyer who was not able to provide diligent and competent representation. A mentally or physically impaired lawyer also would be more vulnerable to a disciplinary complaint or even a malpractice suit involving a mishandled matter. In that respect MR 1.16(a)(2) may protect the lawyer as well. Finally, if a client decides to terminate the representation and discharge the lawyer, for whatever reason, under MR 1.16(a)(3) the lawyer must withdraw. A lawyer cannot force a client to continue to retain him.

Grounds for Optional Withdrawal

The second section of the rule, MR 1.16(b) *permits*, but does not require, that a lawyer withdraw under seven articulated circumstances.

MR 1.16(b)(1) permits withdrawal for any reason as long as the withdrawal does not materially harm the client. Interestingly, the caveat that withdrawal does not prejudice or have a "material adverse effect" on the client's interests is not a factor in the remaining six scenarios set forth in the rule. This is so primarily because in those scenarios, which are discussed below, the client has taken or intends to take some action which is illegal, nefarious or otherwise creates an unreasonable difficulty for the lawyer.

Under MR 1.16(b)(2), a lawyer may withdraw if he has a *"reasonable belie*f" that the client is pursuing a course of action that is criminal or fraudulent. Here the lawyer's withdrawal would have a material adverse effect on the client's interests, but the lawyer still has the discretion to stay or withdraw. Presumably, a lawyer in such a situation would discuss her concerns with the client in the hope that the client will re-think his behavior so that withdrawal may be avoided. By the same token, under MR 1.16(b)(3), if the client has used the lawyer's services to perpetrate a crime or fraud, the lawyer may withdraw, but again is not required to do so.[3]

[3] As we discuss again below, under MR 3.3, which concerns candor toward the tribunal, a lawyer may be required to withdraw from representing a client who intends to or has committed a fraud on the court, even if doing so causes the lawyer to disclose otherwise confidential information under MR 1.6. For a comprehensive discussion of MR 3.3, *see* Chapter 13-1, and for a comprehensive discussion of MR 1.6 *see* Chapter 5-1.

There may be circumstances where a client's conduct, while not criminal or fraudulent, is so disturbing to the lawyer that he finds it impossible to continue to represent the client. For that reason, MR 1.16(b)(4) permits withdrawal if the lawyer considers the client's conduct "repugnant" or if the lawyer has a "fundamental disagreement" with the conduct. While a person always has a right to engage counsel, she does not have a right to a particular counsel.

There are reciprocal obligations in a lawyer-client relationship. Under MR 1.16(b)(5) if the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, *e.g.*, intentional failure to pay legal fees or cooperate with the lawyer in the representation, the lawyer may withdraw. Because a client may have the power to fulfill the obligation, this sub-section requires that the lawyer communicate with the client about his intention to withdraw.

There may be instances in which continued representation may involve additional costs to the lawyer which were not foreseeable or involve a time commitment which the lawyer is unable to meet. Under MR 1.16(b)(6), a lawyer may ethically withdraw if the representation would create an unreasonable financial burden on the lawyer or the representation has already been become unreasonably difficult. There is also a "catch-all" provision, under MR 1.16(b)(7), which permits a lawyer to withdraw for "good cause."

Withdrawal in Compliance with Court Rules or Other Law

The third section of MR 1.16 takes into account that there may be court rules or other law governing a lawyer's withdrawal, including those requiring adequate notice to the client, or a tribunal's permission to withdraw. In some cases, a tribunal might deny a motion to withdraw and order the lawyer to continue with the representation.

Obligations to Client When Representation is Being Terminated

The fourth section of MR 1.16 addresses the practical consequences of withdrawal, either mandatory or optional, which require a lawyer to take reasonable steps to protect a client's interests. A lawyer is not permitted to just walk away from the client. The protective steps include providing notice to the client (to object or look for other counsel), returning papers and property to which the client is entitled and refunding any monies paid for services not performed, or expenses that have not been incurred. Notably, the lawyer is only required to return papers or property to the extent required by other law.

Related Rules

The circumstances under which a lawyer may withdraw intersect with other professional rules. For example, in accepting or continuing representation, a lawyer must be sure he is competent to handle the matter (MR 1.1), can provide diligent representation (MR 1.3) or does not have a conflict of interest (MR 1.7 and MR 1.9). He should also be sure that there is clear agreement with the client as to the scope of the representation (MR 1.2(c)) and when a lawyer provides limited legal services in a not-for-profit setting or assigned counsel situation (MR 6.5). MR 1.14 (diminished capacity of client) and MR 1.4 (proper communication) may also be implicated when a lawyer contemplates withdrawal.[4]

[4] *See* Comment 1 to MR 1.16.

A. Text of Rules

EOIR/DHS

8 C.F.R 1003.17(b)—Appearances

(b) Withdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee.

8 CFR 1003.102(q)(3)—Grounds for Discipline

A practitioner who falls within one of the following categories shall be subject to disciplinary sanctions in the public interest if he or she:

(q) Fails to act with reasonable diligence and promptness in representing a client…

(3) A practitioner should carry through to conclusion all matters undertaken for a client, consistent with the scope of representation as previously determined by the client and practitioner, unless the client terminates the relationship or the practitioner obtains permission to withdraw in compliance with applicable rules and regulations. If a practitioner has handled a proceeding that produced a result adverse to the client and the practitioner and the client have not agreed that the practitioner will handle the matter on appeal, the practitioner must consult with the client about the client's appeal rights and the terms and conditions of possible representation on appeal.

ABA Model Rule 1.16—Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;

(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Comments—Model Rule 1.16

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment [4].

Mandatory Withdrawal

[2] A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the Rules of Professional Conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

[3] When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Discharge

[4] A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

[5] Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

[6] If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

Optional Withdrawal

[7] A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

[8] A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

Assisting the Client upon Withdrawal

[9] Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. *See* Rule 1.15.

B. Key Terms and Phrases

Fraud

Under MR 1.16 (b)(2) and (3), a lawyer is permitted to withdraw if he reasonably believes that his client intends to commit a fraud in connection with the representation or used the lawyer's services to commit a fraud. MR 1.0(d) defines the terms "fraud" or "fraudulent" as applying to conduct that is "fraudulent by substantive and procedural law ... and has a purpose to deceive." With respect to matters before a tribunal, Comment 12 to MR 3.3 provides examples of criminal conduct that "undermines the integrity of the adjudicative process." It includes "bribing, intimidating or otherwise unlawfully communicating with a witness, juror, or court official, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so."[5]

In the immigration context, some examples of immigration fraud are described below:

- A client may make a false claim to a bona fide marriage to gain permanent resident status, employment authorization, and parole even though the parties do not intend to live together as husband and wife.
- In a nonimmigrant visitor application, a client may falsely claim an intent to remain in the United States only temporarily that is supported by false documents related to work or property in a different country.
- A client may submit an employment-based visa petition that is supported by false transcripts or degrees, certificates, or experience letters pertaining to the beneficiary.
- A client may make a false asylum claim that is supported by fabricated documents, such as affiliation with a political organization or ethnic group, a fake arrest record, or similar counterfeit corroborating evidence.

[5] *See* Comment 12 to MR 3.3.

Reasonable Belief

Under MR 1.16(b)(2), a lawyer who reasonably believes that his client is pursuing fraudulent conduct in the representation is given the *option* of withdrawing or continuing the representation. He would not be disciplined for withdrawing or staying with the client under this circumstance. MR 1.0(h) defines the term "reasonable" or "reasonably" as applying to "the conduct of a reasonably prudent and competent lawyer." Under MR 1.0(a), the terms "belief" or "believes" mean that the person involved actually presumed the fact at issue to be true. Under MR 1.0(i), "reasonable belief" denotes that the lawyer "believes the matter in question and that the circumstances are such that the belief is reasonable." While those sub-sections of MR 1.0 may be circuitous because they use the words being defined in the definition itself, they still provide guidance. Whether a lawyer has a "reasonable belief" rather than "knowledge" [6] of a fraud or crime will depend on the circumstances, including the quality of any inquiry taken by the lawyer.[7]

In the immigration context, some examples of client conduct that may lead to a reasonable belief—but not knowledge—of fraud are described below:

- In connection with a permanent residence application, a client nervously hands his lawyer a purported original birth certificate that is old and tattered and on which the client's name is illegible. The lawyer calls attention to the document because the name is illegible and questions the condition of the birth certificate, but the client aggressively denies that the certificate is false and refuses to request another copy or have it verified by an expert. Under the circumstances, the lawyer may have a reasonable belief that his client is attempting to commit immigration fraud.

- In an asylum case, over the course of the representation, the lawyer and the client have had multiple discussions about the client's statements about past persecution during the credible fear interview at the border in which the lawyer has pointed out the weaknesses in his narrative that go to the merits of the claim. A few days before his individual hearing, the client presents the lawyer with a somewhat different story. The facts as told to the lawyer now present a better case for asylum. Because of the discrepancy, the lawyer challenges the client in a mock cross-examination. The client appears nervous, but he manages to correct himself whenever his answers do not help his case. Because of his demeanor and the factual adjustments to his story, the lawyer may have a reasonable belief that the client intends to commit perjury.

- In an employment-based permanent resident application, the client has claimed job experience at a previous employer. The client provides the lawyer with an experience confirmation letter from his old manager, with whom he claims he is still in contact. The lawyer conducts an Internet search for the company, but can find no evidence that any such business existed. The lawyer asks the client to arrange a meeting with the old manager, but the client tells the lawyer that he has become very ill and refuses to be further involved. The lawyer expresses his concerns about the validity of the letter given that he was not able to confirm that the company existed and has not been able to meet the manager. The client tells the lawyer he thinks the owner of the company operated under different names for tax purposes, but he

[6] MR 1.0(f) defines the words "knowingly," "known," or "knows" as denoting actual knowledge of the fact in question which may be inferred from circumstances. Interestingly, the term "know" or "knowledge" does not appear in MR 1.16. As discussed below, with respect to the three circumstances under which withdrawal is mandatory, MR 1.16(a) appears to apply to situations in which the lawyer has either actual or constructive knowledge. *See* discussion below of MR 1.16(a).

[7] Reasonable belief should also be distinguished from a lawyer's suspicion, hunch or "gut feeling" that a client may be involved in fraudulent conduct because of the client's demeanor or even a false statement as to a non-material matter. Lawyers should not assume that doubts about a client's credibility always justify withdrawal under MR 1.16 or that continued representation will lead to the conclusion that the lawyer assisted the client in perpetrating a fraud in violation of MR 1.2.

claims he does not know the names. Based on the absence of Internet information and the unavailability of the manager, the lawyer may have a reasonable belief—but no conclusive proof—that the client is attempting to perpetrate a fraud on the DOL and DHS.

Tribunal

Under MR 1.0(m), the term tribunal is broadly defined and covers many proceedings other than trials. It may be a court, an arbitrator in arbitration, and a legislative body or administrative agency acting in an adjudicative capacity.[8] The term tribunal also encompasses "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority" such as a deposition.[9]

Although there has been no controlling adjudicative or administrative ruling as to what constitutes a tribunal under the Model Rules, a reasonable reading of MR 1.0(m) is that basically all matters in which a lawyer represents a foreign national in obtaining legal status in the United States, even matters submitted via an application which do not require a court hearing, should be deemed appearances before a tribunal. In such matters, "a neutral official, after the presentation of evidence or legal argument by a party or parties, renders a binding legal judgment directly affecting a party's interest in a particular matter."[10] There should be no question that the Executive Office for Immigration Review (EOIR) - Immigration Court, as well as the Board of Immigration Appeals (BIA) and the U.S. Court of Appeals are tribunals.

Agencies such as the United States Citizenship and Immigration Service (USCIS), United States Customs and Border Protection (CBP), Department of Labor (DOL) and the Department of State (DOS) ought to be considered tribunals because a neutral official renders decisions that affect the rights of a foreign national on the basis of evidence submitted, but there is no definitive authority so stating. We believe the best course for the immigration practitioner is to presume that these agencies are tribunals for purposes of the Model Rules, in general. The EOIR grounds for discipline for immigration practitioners (8 CFR §1003.102) are not limited to appearances before a "tribunal" and there is no other use or definition of that term as it relates to professional conduct.[11]

As discussed above, in the absence of a definitive ruling otherwise, the better course for the prudent and conscientious immigration lawyer would be to read both 8 C.F.R §1003.102(q) and MR 1.16 broadly as to what constitutes a tribunal. *For a comprehensive discussion of the term "tribunal" in the context of MR 3.3 (candor toward tribunal) including citations to ethics opinions, court decisions and any other authority, See EC No. 1, MR 3.3.*

C. Annotations and Commentary

Before discussing the specific grounds for mandatory or permissive withdrawal under MR 1.16, we must again highlight two very important qualifiers which apply to all withdrawals. Lawyers reviewing the list of scenarios under MR 1.16(a) and (b) should be mindful of additional requirements designed not only to protect the client, but also to provide for the proper administration of court and agency matters. MR 1.16(c) recognizes that courts and administrative agencies have their own rules governing

[8] Under MR 1.0(m) the term tribunal "denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

[9] *See* Comment 1 to MR 3.3.

[10] MR 1.0(m).

[11] Even with respect to professional discipline, the EOIR does not use the term tribunal. Rather, under 8 CFR§1003.10 (a), the authority to sanction an immigration practitioner is granted to an "adjudicating official or the Board of Immigration Appeals (the Board)."

withdrawal. At a minimum, a court will require that the lawyer obtain permission from the court upon notice to the client. In addition, whether or not court or agency approval for withdrawal is required, MR 1.16(d) requires that the lawyer withdraw in such a way as to avoid prejudice to the client, *e.g.*, the lawyer is required to return property and files to which client is entitled. See discussion of MR 1.16(c) and (d) below. *As is always the case, lawyers must check their respective home state's version of MR 1.16.*[12]

MR 1.16(a)

> (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

MR 1.16(a)(1)

> **MR 1.16(a)(1)**
>
> (1) the representation will result in violation of the rules of professional conduct or other law.

MR 1.16(a) requires that a lawyer *must* decline or withdraw from the representation if it would require that the lawyer violate professional responsibility rules or other law. For immigration lawyers, this would include grounds for discipline under 8 CFR §1003.102. As written, the rule does not appear to have an intent component, but a reasonable reading of the rule is that the lawyer violates MR 1.16(a) when *he knows, or should know*, that by accepting or continuing a representation he will be forced to violate other rules or law. The two most common ethical prohibitions that trigger the requirement to withdraw concern rules prohibiting conflicts of interest and assisting a client in fraudulent or criminal activity. In the immigration context, the lawyer is most likely to encounter a conflict of interest problem in cases of dual representation in family and employment based applications. The immigration lawyer is most likely to encounter problems involving fraud when he knows or reasonably believes his client intends to or has tried to obtain legal status through the submission of false documentary or testimonial evidence. We discuss these and other withdrawal scenarios below.

Rules Violations—Conflicts of Interest

Dual Representation

A common scenario in family or employer based residency applications is that the interests of the petitioner, *i.e.*, the employer or the U.S. citizen or permanent resident spouse, and the beneficiary, *i.e.*, the employee or the non-resident spouse are aligned. Generally, the parties in either case will go to one lawyer to provide all the necessary legal services to obtain legal status for the beneficiary. Although technically the lawyer will be preparing papers to be filed on behalf of the petitioner, as a practical matter the party that usually has as much or more to gain is the employee or spouse seeking legal status. Moreover the beneficiary will usually have a lot of questions for the lawyer. Thus, absent specific precautions, it will generally be accepted that the lawyer is actually representing both clients.[13]

Since MR 1.16(a) requires a lawyer to withdraw if the representation will result in a violation of a professional responsibility rule, in dual representation cases, a lawyer would have to consider whether

[12] For a summary of state variations, *see* below.

[13] This is so unless the engagement agreement with the employer states otherwise, the employee retains her own lawyer or the lawyer expressly advises the employee (preferably in writing) that he is only representing the employer.

the representation would trigger an unresolvable conflict of interest under MR 1.7 (conflicts between current clients) MR 1.9 (conflicts between current and former clients) and MR 1.18 (conflicts between prospective and current clients).[14] A conflict may be resolved by consent of the client after a full explanation of the conflict and any adverse consequences, *i.e.*, "informed consent." Obviously, if the client refuses to consent, under MR 1.16(a), the lawyer would have to withdraw.[15] However, there are some conflicts that are unresolvable and thus unwaivable. For example, a lawyer who represents client A at a trial would have an unresolvable conflict of interest if client B, a current or former client in an unrelated matter, were called as a witness against client A. In such a case, the lawyer's duty of diligence to client A would require the lawyer to use client B's confidential information on cross-examination and cause the lawyer violate his duty of confidentiality to client B under MR 1.6.[16]

In dual representation cases, it is typical for the immigration lawyer to ask the clients to waive foreseeable conflicts [17]that may arise, namely conflicts as to confidentiality (*i.e.*, that any information provided by one party will be not kept confidential from the other party) and adverse interest conflicts (*i.e.*, a change in circumstances that causes the parties' interests to become directly adverse). For the latter scenario, prudent and conscientious immigration lawyers should consider including in the agreement of representation that the lawyer may withdraw from the representation of one party, while continuing to represent the other party in the same matter (generally, the beneficiary in family-based petitions and the petitioner in employment-based petitions). Notably, even if the clients consent, the lawyer must reasonably believe that he can provide competent and diligent representation to the remaining client without harming the interests of his former client. However, there may be circumstances in which a consenting client may revoke consent after the actual conflict arises. If the advance waiver is not deemed enforceable as against the "revoking" client, the lawyer may be required to withdraw from representing both clients in the matter.[18]

Dual Representation and Return of Client Files after Withdrawal

Dual representation may present another ethical problem even if the lawyer withdraws from representing both parties. Since each party was deemed a client, under MR 1.16(d) the lawyer would be obligated to return files to each party.[19] But, if the reason for the withdrawal was a conflict of interest

[14] This is especially so in the marriage case scenario when a lawyer files both the I-130 petition on behalf of the petitioning spouse to classify a spouse beneficiary and the I-485 Application for Permanent Residency on behalf of the beneficiary. *See* MR 1.7, MR 1.9 and MR 1.18.

[15] *See ABA Formal Ethics Op.* 07-449 (2007) (where lawyer represented a judge in one matter and appeared before that same judge on behalf of another client, and judge did not reveal representation as required, required to do so in order not to violate MR 8.4(f) which provides that lawyer may not "assist a judge…in conduct that is a violation of applicable rules of conduct or other law."

[16] *See, e.g.*, *Vermont Ethics Op.* 2008-4 (Lawyer may not continue representing client in a trial where another current client (in unrelated matter) is a witness against trial client and where lawyer would be required to use confidential information on cross-examination).

[17] In some situations , a lawyer may be able to represent one client and withdraw from the other one when the conflict was not foreseeable and just "thrust upon" the lawyer. *See NYC Bar Op.* 2005-5, which also discusses how other jurisdictions have dealt with "thrust upon" conflicts, and characterizes such a conflict as one between two clients that (a) did not exist at the time either representation commenced, but arose only during the ongoing representation of both clients, where (b) the conflict was not reasonably foreseeable at the outset of the representation, (c) the conflict arose through no fault of the lawyer, and (d) the conflict is of a type that is capable of being waived.

[18] *See NYSBA Ethics Op.* 903(January 2012)(in consideration of dual representation in a criminal matter, where one client revoked waiver of conflict, lawyer would have to withdraw unless waiver specifically provided that lawyer may continue to represent non-revoking party [citing among others resources, Comments 4 and 21 to MR 1.7]; Comment 21 to MR 1.7 suggests that whether the lawyer would still be able to continue to represent the non-revoking client "depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.")

[19] Even when both the beneficiary and petitioner are deemed clients under a written or oral retainer agreement, the agreement may provide limitations on the right of one party to obtain the entire file based on the affected party's informed consent.

arising from one party revoking consent, there may be an issue as to whether the lawyer is obligated to provide copies of the entire file to each of the clients. If there was a waiver of confidentiality at the inception of the representation, each party should get the same file.[20] We provide an example of the problem below in the context of dual representation in an employment-based residency matter.

After the lawyer withdraws from representing the employee, the employee, who may now be discharged, requests a copy of the labor certification and the approval notice for the I-140 petition the employer filed on his behalf. Notwithstanding that he has been discharged, the employee may need these documents for the purposes of confirming his immigrant visa priority date, obtaining an H-1B extension beyond the sixth year, or continuing the I-485 application under the portability provisions of AC21 based on the employee's continuing work in the same or similar occupation. Whether an agreement between the parties at the inception of the representation prevented the employee from having access to these documents would be enforceable may depend on the importance of the documents to the employee after termination. Absent such an agreement, in most circumstances the lawyer should provide copies of the same file to both the employer and the employee, although it is obvious that a disgruntled employer could object, thus risking the lawyer's relationship with the employer.[21]

Lawyer-client Conflicts

Another conflict of interest scenario which may require mandatory withdrawal under MR 1.16(a) is a lawyer's conflict of interest in defending a bar complaint or malpractice action. In the case of a bar complaint in which the client has not discharged the lawyer, the lawyer would have to analyze the nature of the conflict under MR 1.7 as to whether there was a "substantial risk that the lawyer's representation would be materially limited" by the conflict and the client provided informed consent.[22]

In the immigration context, for example, a client might file a disciplinary complaint as a way of getting his lawyer to be more aggressive in obtaining the desired results faster because he is afraid of being detained; the client still wants the lawyer to continue the representation, but believes that by filing a bar complaint, it will motivate the lawyer. In such cases, the lawyer may be able to resolve the problems with the client and satisfactorily address the merits of the complaint in the disciplinary investigation without taking any action that would prejudice the client's legal rights or cause injury to the lawyer-client relationship. However, if the lawyer believed his client was lying to the authority to avoid paying an outstanding bill or to obtain an unwarranted benefit in his immigration matter, the lawyer most likely would have to withdraw on the basis that the lawyer's interests in defending himself would be in conflict with the lawyer's duty of loyalty to the client.[23]

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[20] Lawyers should check their home state's version of MR 1.16(d) and any local bar opinions addressing access to immigration files in particular.

[21] EC No. 2, MR 1.6 provides a comprehensive discussion of dual representation in the immigration context, which included discussion of advance waivers and circumstances under which a lawyer may be required to withdraw, with citations to relevant authorities. Readers should consult it when handling a dual representation matter; the section may be found in EC, Chapter 2.

[22] *See, e.g., Oregon Ethics Op.* 2009-182 (defending disciplinary complaint does not create per se conflict, but lawyer must analyze representation under Rule 1.7 and consider communication issues under Rule 1.4); *Atty Grievance Comm. v. Bleeker*, 994 A.2d 928 (Md. 2010)(where lawyer subject to malpractice claim for allowing statute of limitations to expire, lawyer's interests would be at odds with those of the client.); *South Dakota. Ethics Op.* 96-3(in criminal case, trial counsel would be ethically prohibited from filing appeal on client's behalf based on client's ineffective assistance of counsel claim).

[23] Under Rule 1.6(b)(5) a lawyer may disclose confidential information reasonably necessary to defend a disciplinary complaint or malpractice suit.

Rule or Law Violations—Perjury, Fraud, or Other Criminal Conduct

If a lawyer's representation of a client would result in a violation of rules prohibiting dishonesty in general, assisting the client in a fraud or crime, or requiring candor to the tribunal, then MR 1.16(a) requires withdrawal. As discussed above, by inference, the lawyer must know or should know that the representation will result in a violation of one or more of those rules.

For example, in a marriage-based immigrant petition matter, the foreign national wife might admit to the lawyer that she had paid the citizen spouse $3000 to marry her and take the legal steps to help her obtain legal status. She tells the lawyer that under the arrangement, once she obtains her green card, the couple will obtain an uncontested divorce.

Another example would be in an asylum matter when a client confirms the lawyer's suspicions that the facts reported in her asylum application, prepared by a non-lawyer hired by those who smuggled her into the country, are not true. She tells the lawyer that the non-lawyer has told her that she will not be granted asylum unless she testifies under oath as to those exact facts and that is what she intends to do. She asks the lawyer to help her with the false testimony.

In each of those scenarios, it is obvious that if the lawyer continues with the representation under the client's planned course, the representation would result in the violation of professional rules and the law, since each of the clients would be committing immigration fraud. If the lawyer is unable to persuade the clients not to engage in the fraud, withdrawal is mandatory under MR 1.16(a). MR 1.16(a) interacts with MR 3.3 if, as in the scenarios above, the fraud may be on the tribunal. A lawyer has the obligation under MR 3.3 to prevent or rectify a fraud on a tribunal. Assuming the application has been filed, withdrawal without more may not comply with MR 3.3. Under MR 3.3, a motion to withdraw would have to contain enough information to apprise the court or other tribunal of the fraud, but not so much that the lawyer unnecessarily discloses protected information.[24] The tension between the duty to disclose in a motion to withdraw and the lawyer's duty of confidentiality presents a dilemma for the lawyer. Lawyers may choose to use language suggested in Comment 3 to MR 1.16, *i.e.*, that "professional considerations" require withdrawal, but they may find that such information does not alert the court that a fraud is being perpetrated. Perhaps for that reason the Comment also reminds the lawyer to be mindful of the obligations imposed under MR 3.3 and MR 1.6. Some lawyers may choose to indicate that they are seeking withdrawal in accordance with the "professional rules of responsibility." Others may decide to cite to the specific rule under which withdrawal is sought as the only way to be sure that the court understands that a fraud is being perpetrated.

Related to the question of a client's intention to commit immigration fraud is the situation in which a client discharges the lawyer rather than have her lawyer disclose a fraud or the client's intent to perpetuate a fraud on a tribunal. For example, while prepping a client for an I-485 adjustment of status to permanent resident interview with USCIS, the client tells the lawyer he had been charged with engaging in consensual sex with a 15 year old girl and admitted doing so. He tells the lawyer the charges were

[24] Jurisdictions may vary on the importance placed on the duty of confidentiality and the duty of candor. A minority of states have not adopted MR 3.3's requirement that the lawyer disclose the fraud if all remedial measures are unsuccessful. In particular, several states are clear that a lawyer must hold inviolate the confidences of his client. Those states are California, Tennessee, Oregon, and the District of Columbia. In each of those states disclosure of the false evidence or testimony is not included in the remedial measures the lawyer may take. Two other states vary somewhat from MR 3.3's duty of candor, but in different ways. New Jersey's Rule 3.3 imposes an additional disclosure obligation on the lawyer as to facts the omission of which would mislead a tribunal, regardless of whether the lawyer is appearing ex parte or with opposing counsel present. North Dakota's Rule 3.3 includes disclosure as a remedial remedy, but not when the false evidence is introduced through the client's testimony. Immigration lawyers admitted in the above states, or those that may practice immigration law in one of them, should be aware of the differences. (For a more detailed discussion of the state variations regarding MR 3.3, *see* EC 1, Appendix A). Lawyers should always check their state's version of the Model Rules.

dismissed because the young girl refused to testify in court. The client tells the lawyer he is not prepared to admit that he had sex with the girl if the question comes up during the interview because of inadmissibility concerns if he admits to committing statutory rape. The client decides to fire the lawyer because he informs the client that he cannot ethically permit the client to lie. Although MR 1.16(a)(3), discussed below, requires a lawyer to withdraw upon being discharged by the client, under the circumstances here the lawyer has been discharged because of his ethical obligation of candor toward the tribunal. As in the scenarios above, withdrawal without more, also may not be sufficient to comply with MR 3.3.

In this regard, the requirements of MR 1.16(a) and MR 3.3 provide the lawyer with leverage in persuading the client to refrain from committing a fraud or other crime in connection with the representation.

Rule Violations—Excessive Caseloads

If a lawyer's caseload is so excessive that the lawyer is not able to render diligent and competent representation, as required by MR 1.1 and 1.3, withdrawal may be mandatory. Lawyers who have excessive caseloads may not be able to manage their time in a way that permits diligent representation. They may not employ adequate calendaring systems or lack the resources to use them properly. Absent proper safeguards, lawyers with excessive caseloads are more likely to miss agency or court deadlines and less likely pay adequate attention to their clients' matters. However, a lawyer faced with such a problem may be able to obtain the necessary support or reduce his caseload. If not, he may have no choice but to withdraw, subject to applicable law requiring notice or permission of a tribunal.[25]

Privately retained lawyers who seek to withdraw from one or more cases on the basis that their excessive caseload will prevent them from providing competent and diligent representation are not explicitly precluded under MR 1.16 (a) from considering the difference in the fees generated by one case over another and deciding to keep the more lucrative cases. They must, however, under MR 1.6 (d) as discussed below, take steps to protect the client's interests. Moreover, to the degree that a lawyer's withdrawal may cause prejudice to the client's case, for example, when the client is not in the position to retain other counsel timely, or pay additional fees or proceed pro se—the court may deny the motion or condition it on the retention of substitute counsel. Under such circumstances, the court may question the lawyer further about her caseload and upcoming commitments.

MR 1.16(a)(2)

> **MR 1.16(a)(2)**
>
> (2) physical or mental condition materially impairs the lawyer's ability to represent the client.

Physical or Mental Impairment—"Know Thyself"

Under this sub-section, a lawyer *must* decline or withdraw if she is physically or mentally unable to provide what would amount to diligent or competent representation. While expressed as a rule of

[25] *See South Carolina Ethics Op.* 04-12 (2004)(lawyer should move to withdraw if excessive caseload would result in violation of professional responsibility rule, *e.g.*, competence, diligence); *ABA Formal Ethics Op.* 06-441(2006) (lawyers representing indigent clients must refuse to accept a workload that prevents them from meeting their ethical obligation to each client); *Oregon Ethics Op.* 2007-178 (September 2007)(lawyer must control caseload when representing criminal defendants whether as a sole practitioner or part of public defender agency); *Va. Ethics Op.* 1798(August8,2004)(prosecutor who practices with an excessive caseload impeding competency violates Rule 1.1 and supervising prosecutor assigning such a caseload violates Rule 5.1).

discipline, Rule 1.16(a)(2) is unlikely to be the sole basis for discipline.[26] First, any lawyer who was mentally or physically impaired within the meaning of MR 1.16(a)(2) and did not withdraw would almost certainly be found to have violated other rules, most likely MR 1.1 (competence) or MR 1.3 (diligence). Rarely would discipline under MR 1.16(a)(2) seem appropriate for violating that rule without more.

Ironically, a lawyer's mental impairment may interfere with his ability to assess the quality of his representation in the first place. This is a serious problem for lawyers, clients and the legal profession, given the much higher than average rate of alcoholism or mental illness among lawyers compared to the general population.[27] Perhaps for this reason, most disciplinary agencies have procedures in place to temporarily suspend a lawyer on the basis of a mental or physical impairment that is discovered in the course of a disciplinary investigation or brought to the attention of the authority through other means.[28]

Lawyers should be aware of MR 1.16(a)(2) and seek assistance at the first sign of any potentially debilitating impairment. In particular, every state bar offers a confidential lawyer's assistance program (LAP) free of charge to help lawyers who grapple with alcoholism, substance abuse, depression, stress or other mental health issues.[29] All lawyers, including those that practice immigration law, who feel burned out or are having difficulty functioning on a day to day basis should consider getting help. The failure to do so over time may result in the breakdown of the lawyer's law practice or a disciplinary investigation and sanction.[30]

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[26] We are not aware of any cases in which an immigration lawyer suffering from a mental or physical impairment was disciplined solely on the basis that he did not withdraw in accordance with Rule 1.16(a)(2). Examples of cases involving non-immigration lawyers who engaged in other rule violations and failed to withdraw under Rule 1.16(a)(2) include: *Lawyer Disciplinary Comm. v. Dues*, 624 S.E.2d 125 (W. Va. 2005)(among other violations including neglect and failure to communicate in one of a number of litigation matters, lawyer suffering from depression failed to withdraw in accordance with Rule 1.16(a)(2), *Okla. Bar Ass'n v. Southern*, 15 P.3d 1 (Okla. 2000) (lawyer who had vitamin deficiency which caused short-term memory loss and exacerbated depression, but did not withdraw in violation of Rule 1.16; lawyer was aware that his legal performance had fallen below the required standard of competent representation, as evidenced by numerous client complaints).

[27] *See* "Disbarment of Impaired Lawyers," Judith M. Rush, William Mitchell Law Review, Vol. 37, Iss. 2 [2011], Art. 18 at 923. (in discussing "lawyers in crisis" refers to ABA estimates that 15% to 20% of lawyers suffer from alcoholism compared to 9% of the general population; "The Professional Cost of Untreated Addiction and Mental Illness in Practicing Lawyers, Mary T Robinson, ABA Journal of the Professional Lawyer , 2009 ABA Prof. Law. 101-102 (in discussing effect of alcohol abuse and mental illness on lawyers, reports that 25% of lawyers who face disciplinary charges are "identified as suffering from addiction or mental illness").

[28] *See, e.g., Matter of Stickel*, 34 AD3d 139 (1st Dept. 2006)(in accordance with 22 NYCRR 603.16(c)(1), lawyer who was subject of disciplinary charges suspended based on impairment from a stroke which rendered him unable to defend himself; notably, court also appointed receiver to inventory lawyer's substantial caseload for purposes of protecting clients' interests); *In re Clark*, 834 N.W.2d 186 (Minn. 2013)(lawyer transferred to "disability inactive status," in connection with disciplinary proceeding, where she was unable to competently represent clients because of serious mental health issues; court rejected the lawyer's argument that she could practice law with "reasonable accommodations;" Minn. R. 28(a) provides that lawyer who has a mental illness or habitually uses alcohol or other drugs that prevents the lawyer from competently representing clients must be placed on disability inactive status).

[29] The ABA provides a directory of state lawyer's assistance programs which may be found at [*http://www.americanbar.org/groups/lawyer_assistance/resources/lap_programs_by_state/colap_directory.html*]; *see also* MP McQueen, The Am Law Daily, "More Lawyers Asking for Help for Alcohol, Drug Abuse," [*http://www.americanlawyer.com/id=1202663819141/More-Lawyers-Asking-for-Help-for-Alcohol-Drug-Abuse#ixzz38y7AfzhH*] and California Lawyer Assistance Program [*http://www.calbar.ca.gov/Attorneys/MemberServices/LawyerAssistanceProgram.aspx*]; New York Lawyer Assistance Program [*http://www.nysba.org/LAP*].

[30] *In re Smith*, 381 N.W.2d 431 (Sup. Ct. Minn. 1986)(immigration lawyer who had seriously neglected client matter and engaged in misrepresentation to conceal neglect had been suffering from a severe depression disorder for years, which contributed to the ethical violations); *In re Cooney*, 868 A.2d 656 (Sup. Ct. R.I. 2005)(immigration lawyer presented evidence that she had been under medical treatment for depression and attention deficit disorder, which contributed to neglect of client matter, but had agreed to work with a "monitoring" lawyer); *Disc. Counsel v. Meade*, 127 Ohio St. 3d 393 (Ohio 2010)(immigration lawyer engaged in neglect and failed to turn over file after discharge to new lawyer, refused to seek assistance from the state LAP program and defaulted as disciplinary hearing was suspended indefinitely).

It is not a question of merely avoiding a finding that the lawyer violated MR 1.16(a)(2). That would be the least of the lawyer's problems. It is much more important that lawyers understand they have a responsibility to their clients that overshadows their egos, financial concerns or any other personal interests. Unfortunately, many lawyers are either too impaired or too embarrassed to acknowledge that they need help. For some, a disciplinary investigation may be a sufficient wake-up call and they may seek help. For others, who do not seek help or are otherwise not able to manage their impairment, the result may be the loss of a legal career, at a minimum.[31]

Of course, with respect to 1.16(a)(2), a lawyer is only required to withdraw when the physical or mental condition "materially impairs" the lawyer's ability to represent the client and not where the lawyer is willing to persevere even if he or she finds it difficult to do so. A lawyer with a disability, therefore, is not required to withdraw, even if it causes him or her unreasonable difficulty so long as the disability does not materially impair his or her ability to represent the client. Lawyers with disabilities can still continue representation even though they may experience difficulty—so long as it does not materially impair their ability to represent the client.

Responsibility to Report Impaired Lawyers

All lawyers also should be aware of MR 8.3, under which a lawyer who "knows" that another lawyer has violated a rule that would adversely reflect on a lawyer's fitness to practice is obligated to inform the appropriate disciplinary authority.[32] Under MR 8.3, the violation could be the failure of the impaired lawyer to withdraw on the basis of her impairment under MR 1.16(a). Nevertheless, a lawyer might feel uncomfortable informing a disciplinary authority about a colleague solely on the basis of a substance abuse problem or depression. In such cases, the lawyer may consider in the first instance taking steps to get help for impaired colleagues by reaching out to other lawyers, friends or family, mental health professionals or state bar Lawyer Assistance Programs. Whether or not a lawyer would be disciplined under MR 8.3 for failing to report an impaired lawyer would depend on the circumstances.[33]

Impairments as Mitigation

Impairments such as substance abuse or depression may be asserted by a lawyer as a mitigating factor in a disciplinary proceeding predicated on other professional misconduct. Impaired lawyers who did not withdraw from cases in accordance with Rule 1.16(a)(2) or 1.16(d) still have asserted their impairment as a mitigating factor in disciplinary proceedings. The impairment will generally not be accepted in mitigation unless the lawyer is able to establish that the impairment was *causally* related to the misconduct.[34] Where it is deemed to be causally related, the lawyer may find himself in a catch-22

[31] *See, e.g., In re Allen*, 286 Kan. 791 (Kan. 2008)(after receiving ten years of treatment for post-traumatic stress syndrome (severe depression and anxiety, among other things) which interfered with the immigration lawyer's ability to properly deal with clients and function in court proceedings, lawyer abruptly abandoned practice; lawyer indefinitely suspended but ordered to take appropriate measures to go through his cases to permit appropriate resolution of matters).

[32] There are also scenarios under which a partner or supervising lawyer may be deemed liable for the misconduct of an impaired lawyer. *See, e.g.,* MR 5.1 (b) which provides that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct".

[33] In a case which did not involve lawyer impairment, an Illinois lawyer was disciplined for failing to report his client's first lawyer who had converted funds, at the request of the client whose primary concern was working out a settlement with the lawyer to recover the funds in exchange for not bringing civil, criminal or disciplinary charges. *See In re Himmel*, 533 N.E.2d 790 (1988).

[34] *In re Disciplinary Action against Merlin*, 572 N.W.2d 737 (Minn. 1998)[lawyer's assertion of medical problems as mitigating factor in neglect cases not credited where there was no evidence of physical or psychological problem which caused misconduct; lawyer also failed to advise client of suspension for failure to pay registration fees and to withdraw from the representation in accordance with 1.16(d)].

situation if the disciplinary authority concludes that under the circumstances the lawyer was required to withdraw.[35]

Obligations to Clients When Withdrawing for Health Reasons

As discussed below, under MR 1.16(d), any withdrawal from representation, even for mental or physical impairment, still requires the lawyer to take reasonable steps to protect the client. A Kansas immigration lawyer who had health problems, which presumably caused him to close his practice, was found to have violated MR1.16(d) even though he did provide some notice to his clients, as follows:

Please note that due to health problems I will no longer be able to practice law. As of February 24, 2006, I will be retired. Effective this date I will not be able to answer any questions about your case or give any legal advice. If you need further legal advice or legal representation in this case, you will need to hire another attorney. My office is now permanently closed. My mailing address is found in the letterhead above.[36]

Here, the lawyer's notice did not protect the interests of his clients because he did not provide his clients time to obtain new counsel, retrieve their files, or receive a return of any unearned fees or any property he held on their behalf. The facts reported in this case do not indicate if the lawyer had matters pending in any tribunal. If so, the lawyer would have been required to comply with MR 1.16(c) by filing motions to withdraw in every pending case

MR 1.16(a)(3)

> **MR 1.16(a)(3)**
>
> (3) the lawyer is discharged.

Client Dissatisfaction—Discharge

While it may be self-evident that a lawyer should not continue representing a client after he is discharged, MR 1.16(a)(3) makes clear that the lawyer still has to "withdraw". If the matter is pending before a tribunal, under MR 1.16(c) the lawyer would have to comply with the tribunal's rules, which in most cases still would require a formal motion to withdraw. The discharged lawyer also would have to comply with MR 1.16(d) which would include turning over client property and files and other actions to prevent any material harm to the client.[37] MR 1.16(d) does not require that a client's discharge be confirmed in writing as required in some state versions of MR 1.16(d), but where a motion to withdraw is not required, as is usually the case of a transactional matter, or where a notice of appearance has not

[35] *See, e.g., Lawyer Disciplinary Comm. v. Dues*, 624 S.E.2d 125 (W. Va. 2005)(among other violations including neglect and failure to communicate in one of a number of litigation matters, where lawyer's depression was deemed a factor in mitigation, lawyer found to have violated Rule 1.16(a)(2) by failing to withdraw); *In re Francis*, 4 P.3d 579 (Kan.2000)(where lawyer "admitted" that his impaired mental condition was causally related to neglect, court found that lawyer should have realized that he was unable to effectively represent client and should have withdrawn in accordance with Rule 1.16(a)(2); *but see Okla. Bar Ass'n v. Southern*, 15 P.3d 1 (Okla. 2000) lawyer's severe vitamin deficiency which caused short-term memory loss and exacerbated his existing depression was deemed a factor in mitigation, but failure to withdraw under those circumstances was deemed factor in aggravation, not a violation of Rule 1.16(a)(2)).

[36] *In re Allen*, No. 99,645, 2008 Kan. LEXIS 394 (Kan. July 25, 2008) (where lawyer closed office due to health problems, notice sent to clients without more was deemed abandonment of practice which did not satisfy requirements of 1.16(d) to, among other things, return unearned portion of fees).

[37] *People v. Post, 2000 Colo. Discipl*. LEXIS 80 (Colo. May 15, 2000)(discharged lawyer failed to withdraw from the representation and also failed to take steps to protect the interests of several clients, including surrendering papers and property and refunding advance payments, in violation of 1.16(d)).

been filed, the prudent and conscientious lawyer should confirm termination as a matter of good practice.[38]

The requirement that a lawyer withdraw and refrain from providing further legal services after discharge protects the client from having to pay the lawyer for any unauthorized legal services after discharge or being bound by any unauthorized action taken by the lawyer after discharge. A discharged lawyer might try to take some further action in good faith to compensate the client for a previous failure to complete a task. While the lawyer's motive may be understandable, any post-discharge unauthorized action would violate MR 1.16(a)(3).[39] One lawyer who filed papers after discharge in violation of rule 1.16(a)(3) apparently did so as part of a scheme to falsely represent the status of the client's matter. Needless to say, the lawyer's conduct only exacerbated the disciplinary charges against him.[40]

A client may be dissatisfied with appointed counsel and "discharge" him in the same way as any client would discharge paid counsel. The appointed counsel would still have to move to withdraw and, depending on the circumstances, her motion may be denied by the court. Comment 5 to Rule 1.16 reminds lawyers that proper representation would include discussing the consequences of discharging appointed counsel with the client, which might include the requirement that he proceed *pro se*.[41] In the immigration context, a lawyer providing *pro bono* representation could conceivably be discharged by the client and it would behoove that lawyer to explain to the client that he may not be able to get another lawyer and there may be other consequences, in accordance with Comment 5.

Discharge When the Client is Impaired

Although Rule 1.16(a)(3) makes clear that a client always has the right to discharge a lawyer, additional burdens may be placed on a lawyer whose client may lack the mental capacity – intellectually or emotionally – to fully appreciate the consequences of discharging her lawyer. In such a situation, before withdrawing, the lawyer should do whatever she can to assist the client in considering the consequences, especially those that are adverse to the client's interests.[42] As reflected in Comment 5 to MR 1,16(a), the lawyer should review MR 1.14 which permits a lawyer to take reasonably necessary protective action in cases where his client is incapacitated in some way. *See discussion under MR 1.16(b)(7)(permissive withdrawal upon good cause) for further discussion of impaired or incapacitated clients, below.*

MR 1.16(b)

> (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

[38] *See, e.g.,* Conn. RPC 1.16(d) which requires withdrawal to be "confirmed" in writing; *Statewide Grievance Comm. v. Paige*, 2004 Conn. Super. LEXIS 1922 (Conn. July 14, 2004) (lawyer violated Conn Rule 1.16(d), among other rules, when client terminated lawyer and refunded unearned fee, but failed to send "confirming" letter under Conn. Rule 1.16(d) requires written confirmation of termination.)

[39] *Cincinnati Bar Ass'n v. Sigalov*, No. 2011-0120, 2012 Ohio LEXIS 2020 (Ohio Aug. 28, 2012)(after client terminated immigration lawyer for filing defective motion, retained new counsel, and obtained his file, lawyer filed a motion to re-open which was denied by court for lack of evidentiary support; lawyer found to have violated Rule 1.16(a)(3) requiring that lawyer withdraw after discharge).

[40] *Florida Bar v. Nunes*, 734 So.2d 393 (Fla. 1999)(lawyer continued to represent immigrant clients in civil matters, after acknowledging that representation had been terminated, by filing several pleadings on their behalf after he was dismissed in violation of 1.16(a)(3); lawyer then used unauthorized pleadings to falsely portray that he had won his clients' case so that he could in turn falsely argue in state and federal courts that the disciplinary suspension imposed by the Court should be overturned and that he was entitled to damages).

[41] Comment 5 to Rule 1.16.

[42] *See* Comment 6 to Rule 1.16 which states in part that a "lawyer should make special effort to help the client consider the consequences [of discharging the lawyer] and may take reasonably necessary protective action as provided in Rule 1.14."

MR 1.16(b)(1)

> **MR 1.16(b)(1)**
>
> (1) withdrawal can be accomplished without material adverse effect on the interests of the client

Do No Harm

Rule 1.16(b)(1) permits the lawyer to withdraw at any time and for any reason – but with the caveat that the withdrawal will have no material adverse impact on the client. The phrase "material adverse impact" is not a defined term, but it generally refers to some harm to the client's legal matter, not mere inconvenience. A client's disappointment with the lawyer's withdrawal would not have material adverse effect on his legal matter; nor would the financial "harm" that may result from having to pay the new lawyer for time spent getting up to speed on the matter. If a lawyer withdraws at the early stages of a matter, the client will not likely suffer any material harm either. In addition, where the matter is before a tribunal, the lawyer will have to comply with applicable rules or law, in which the court has the discretion to approve any motion to withdraw.[43] Even when a deadline is imminent, the withdrawing lawyer may be able to obtain an extension or continuance. When it is clear that withdrawal will have a material adverse effect on the client, the lawyer may not have the option of withdrawing[44] unless the reason for the withdrawal is covered by the ground for withdrawal set forth in sub-sections 1.16(b)(2) through (b)(7). In those circumstances, the withdrawal will almost always have a material adverse effect on the client.

For example, an immigration lawyer may not have the option of withdrawing one day before the deadline for filing a response to a notice of intent to revoke an I-130 approval or before the one-year filing deadline for an asylum application. Similarly, an immigration lawyer would not likely be permitted to withdraw on the day before an individual calendar hearing.

MR 1.16(b)(2)

> **MR 1.16(b)(2)**
>
> (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent

Choosing to Walk a Fine Line

Whereas Rule 1.16(a) would require a lawyer to withdraw when he *knows* that continued representation would violate another rule of professional conduct or law, *i.e.*, suborning perjury or helping to perpetuate a transactional crime, MR 1.16(b)(2) permits withdrawal in situations which the lawyer only *reasonably believes* that the client is using the lawyer's services to commit a fraud or crime. A lawyer who is risk adverse would be more inclined to withdraw under those circumstances. If the client's actions could involve a fraud on a tribunal, the lawyer may choose to withdraw to avoid the potential obligation under MR 3.3 to disclose confidential information about the fraud to the tribunal. For lawyers, whose services basically involve matters before a tribunal, the requirements of MR 3.3 can be onerous.

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[43] *See, e.g., Coleman-Abedayo v. Johnson*, 668 F. Supp. 2d 29 (DDC 2009)(lawyer can withdraw as long as it does not affect client's interest in materially adverse way).

[44] *See, e.g., DC Ethics Op.* 353 (2010)(Lawyer representing incapacitated person and dealing with relative with power of attorney should not withdraw when relative accused of misusing client's money because withdrawal might cause substantial harm to client's interest); *In re Edin* , 697 N.W. 2d 717 (lawyer who abruptly withdrew from unresolved matter suspended).

Other lawyers who choose to continue to represent clients even when they have a reasonable belief that the client may be attempting to commit a fraud or crime would have to satisfy themselves that they could continue to diligently represent their clients under MR 1.3 and walk the thin line between reasonable belief and conscious avoidance of knowledge.[45] The lawyer must understand that he will have to withdraw under MR 1.16(a) if he comes to know of the fraud or crime and cannot otherwise prevent or remedy the fraud after remonstrating with the client as required by MR 3.3.

Lawyers faced with the dilemma of representing a client who is planning to commit a fraud or crime must comply with MR 1.2(d) which prohibits a lawyer from engaging in or assisting a client in conduct he *knows* is criminal or fraudulent.[46] A lawyer, however, may ethically discuss the consequences of the unlawful conduct at issue or assist the client in good faith to determine what conduct is or is not lawful.[47] Providing legal advice is after all one of a lawyer's prime responsibilities, but the lawyer is not always able to control what a client decides to do with that information.

Examples of the ways in which a desperate or ill-advised foreign national may attempt to obtain legal status through fraud might include the following:

- A foreign national, without the lawyer's knowledge, may attempt to obtain residency based on a sham marriage after learning that a marriage-based petition is the only available path to legal residency and the methods by which USCIS verifies the validity of the marriage.
- An immigration client may decide to withhold negative information from his lawyer, *e.g.*, past entries without inspection, that would otherwise be an obstacle to legal status.
- A petitioner may fail to disclose to a lawyer that she has filed multiple Affidavits of Support for family members in a misplaced effort to assist the beneficiary in obtaining legal status.

Most prudent and conscientious immigration lawyers have standard background questions for their clients, or those who provide support, that may trigger the need for further inquiry. The extent of the immigration lawyer's inquiries will depend on the circumstances.

As we discuss in more detail below, under MR 1.16(c), whenever a lawyer decides to withdraw from a matter pending before a tribunal, especially if he is withdrawing under MR 1.16(b)(2) or (b)(3), discussed below, he must abide by applicable rules and law, which almost always will require the lawyer to file a motion to withdraw explaining the reasons for the withdrawal and other requirements. This may trigger possible disclosure of protected confidential information. There is an interplay between MR 1.6 (duty of confidentiality) and 1.16(c). Other rules which come into play in connection with withdrawal based on a client's potential or actual fraud or crime are MR 1.4(2) and (5) (requiring consultation with client).[48]

Lastly, as in the case of MR1.16(a)(mandatory withdrawal), a lawyer who reasonably believes that his client is using the lawyer's services to commit fraud or a crime, may use his right to withdraw as leverage when discussing his concerns with the client. This is consistent with the obligations under MR

[45] Refer to Ethics Compendium No. 1, MR 3.3.

[46] Rule 1.2(d) provides that a "lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

[47] *Id.*

[48] Rule 1.4(2) provides that a lawyer "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Rule 1.4(a)(5) provides that a lawyer "consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law."

3.3, as well, in that the duty to disclose confidential information pertaining to a fraud on the tribunal only applies when the lawyer knows of the fraud. When a lawyer has only a reasonable belief that his client's actions are fraudulent, he may continue with the representation and he has no obligation to reveal otherwise confidential information to the court. Indeed absent knowledge of a fraud, the lawyer has a duty not to disclose confidential information.[49] Accordingly, the lawyer must be somewhat circumspect in providing the reasons she seeks permission to withdraw. As discussed above at pp. ----------[discussion under 1.16(a) perjury] , in this case, a statement that "professional considerations" justify withdrawal should be sufficient. Whether or not a lawyer chooses to remain or withdraw may depend on many factors including whether the lawyer is risk-averse, her feelings about the client, and whether the lawyer is able to control the kind of evidence presented to the tribunal.

MR 1.16(b)(3)

> **MR 1.16(b)(3)**
>
> (3) The client has used the lawyer's services to perpetrate a crime or fraud

MR 1.16(b)(3) is essentially the same as (b)(2) except it applies to situations where the lawyer learns after the fact that the client used the lawyer to further or carry out the crime or fraud. The lawyer again has the *option* of withdrawing on good grounds. Although (b)(3) does not articulate the "reasonable belief" state of mind, the inference is that it applies as in (b)(2) as well. If the lawyer had knowledge of the client's illegal conduct committed in connection with the representation, he would have to withdraw under MR 1.16(a)(1) because the representation had resulted in a violation of a professional rule or law.[50] For that reason alone, it is fair to read MR 1.16(b)(3) as applying to a lawyer's reasonable belief.

MR 1.16(b)(4)

> **MR 1.16(b)(4)**
>
> (4) The client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement

To a degree, the lawyer-client relationship is a partnership and presupposes that the "partners" will approve or at least tolerate the actions of each other. Where one partner insists on engaging in conduct of which the other partner not only disapproves, but also finds repugnant, it is not likely that the partnership will continue.[51] MR 1.16(b)(4) provides that a lawyer may withdraw when a client insists on taking action that the lawyer considers repugnant. There is no requirement in this sub-section that the action must be repugnant to society in general. However, it is not likely that a court would grant a motion to withdraw without the lawyer asserting some reasonable basis for finding the conduct

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[49] *See* Ethics Compendium No. 1. MR 3.3, EC NO. 2. MR 1.6.

[50] *See* Comment [10] to MR 1.2 which provides as follows:

When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer *knows* are *fraudulent* or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. *See Rule 1.16(a)*. In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. *See Rule 4.1*.

[51] Repugnant is not a defined term, but its everyday meaning would describe conduct that could be considered obscene, disgusting, offensive, distasteful or even shocking but not necessarily illegal. It could include conduct that is contrary to a lawyer's deeply held religious beliefs, for example, a client's decision to obtain an abortion.

repugnant. Lawyers should note that MR 1.16 (b) also includes "good cause" as a basis for withdrawal, as we discuss below.

Even when a lawyer does not find certain actions repugnant, a workable lawyer-client relationship may be hard or even impossible to maintain when the lawyer and client have a good faith but unresolvable disagreement about an action to be taken by the client or even when the client insists on doing things a certain way against the lawyer's recommendation. In such cases, a lawyer is also permitted to withdraw under 1.16(b)(4). However, a fundamental disagreement as to an action that is normally left to the client, for example, settlement in a civil matter or testifying in a criminal matter, would not be grounds for withdrawal under this sub-section.[52]

Although Rule 1.16(b)(4) does not require that the lawyer give the client warning that he may withdraw as in Rule 1.16(b)(5) below, it is hard to imagine how a lawyer could diligently represent his client without threatening to withdraw when a client refuses to accept the lawyer's best judgment that a particular action would be of no help, or even worse, actually harm the client.[53] A lawyer obviously would have a fundamental disagreement with a client who intends to commit a crime, but since Rules 1.16(b)(2) and (3) cover that scenario, Rule 1.16(4) should be read to apply to cover client actions which are non-criminal.[54]

In the immigration context, a lawyer may have a fundamental disagreement with a client's insistence on pursuing permanent residence based on an extraordinary ability petition, rather than though a labor certification application, when the lawyer believes that the client's qualifications most likely will not meet the stringent standards for extraordinary ability.

An immigration lawyer may have a fundamental disagreement with a client in a removal hearing, when the client insists after doing her own online research that the lawyer submit to the court articles, statements of law or evidence that are not relevant to the case. For example, in an asylum case, a client may believe that he falls under a particular social group and insist that the lawyer submit the client's analysis of law in a pre-hearing brief and supporting evidence, even though the lawyer, after his own research, determines that the client is incorrect.

In a marriage-based permanent residence application, an immigration lawyer may find it repugnant that the U.S. citizen husband refuses to permit his foreign national wife to use birth control even though they have had four children in five years and the wife has been hospitalized twice in the last year for mental and physical exhaustion. The wife is too afraid of her husband to disobey him.

MR 1.16(b)(5)

> **MR 1.16(b)(5)**
>
> (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

[52] *See, e.g., Kay v. Home Dept, Inc*, 623 So.2d 764 (Fla. Dist. Ct. App. 1993)(client's refusal to accept settlement recommended by lawyer without more insufficient basis for withdrawal); *Nichols v. Butler*, 953 F.2d 1550 (11th Cir.1992)(criminal defense lawyer improperly threatened to withdraw if client testified, where decision was tactical and did not involve potential perjury; client had constitutional right to testify; ineffective assistance of counsel found).

[53] The lawyer is obligated under MR 1.4(a)(1) to discuss the means by which the client's objective are to be accomplished and under MR 1.4(b) to explain matters "reasonably necessary to permit the client to make informed decisions regarding the representation."

[54] Nothing in Rule 1.16 prohibits a lawyer from citing more than one basis for withdrawal and it would be up to the lawyer to decide.

Rule 1.16(b)(5) recognizes that in a lawyer-client relationship obligations flow both ways. Virtually all of the Model Rules concern lawyers' obligations. When a client fails to meet an obligation, whether willfully or not, the lawyer may be permitted to withdraw.[55] However, before seeking to withdraw under (b)(5), the lawyer is required to advise the client that he will withdraw unless the obligation is fulfilled. This gives the lawyer some leverage to persuade the client to meet his obligations and gives the client the opportunity to fulfill the obligation as well.

Failure to Meet Obligation to Pay Fees

One of most common bases for withdrawal under MR 1.16(b)(5) is the client's failure to pay the lawyer's fee or agreed upon expenses.[56] There is no intent component under this sub-section of the rule, but when a client is simply unable to pay the fee—as opposed to a client who deliberately refuses the pay the fee—a court will be more likely to consider other factors in determining if withdrawal should be permitted.[57] Sometimes a court will grant the motion to withdraw if the lawyer fulfills certain conditions, such as remaining counsel of record for a set period of time to allow the client to obtain new counsel.

There is no guarantee that a court will grant a motion to withdraw based solely on a client's non-payment of fees, but it would not violate MR 1.16(b)(5) to so move. MR 1.16(b)(5) does not give a lawyer an automatic right to withdraw if the client refuses to pay fees that were not set forth in the original retainer or refuses to agree to a superseding retainer agreement during the course of the representation.[58] At least with respect to MR 1.16(b)(5), the lawyer must stick to his original retainer terms and may have to suffer the consequences of making a bad deal. When there is no written engagement agreement disclosing the lawyer's fees, the lawyer may have difficulty obtaining permission to withdraw if there is a dispute as to the amount owed in the first place.[59]

A typical non-payment of fee problem faced by immigration lawyers occurs when the lawyer is called upon to provide unanticipated legal services. For example, a lawyer and client may have agreed to a flat fee for two master calendar hearings and one individual hearing in which the lawyer would pursue two different specific forms of relief. During the course of representation an additional and more favorable form of relief becomes available. This might include the filing of a I-130 if the client married, a U visa if the client is a crime victim or becomes eligible for post-conviction relief, or relief under Deferred Action for Childhood Arrivals (DACA) Pursuing one of these new forms of relief may have a significant positive impact on the outcome of the case. If the client refuses to pay for the lawyer's

[55] Comment 8 to MR 1.16 states that a "lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation."

[56] *Brandon v. Blech*, 560 F.3d 536 (6th Cir. 2009)(court found client's failure to pay past-due bills a failure to fulfill obligation to lawyer under (b)(5) noting that "while these rules stop short of guaranteeing a right to withdraw, they confirm that withdrawal is presumptively appropriate where the rule requirements are satisfied").

[57] *US v. Parker*, 439 F3d 81 (2d Cir. 2006)(non-payment of legal fees without more is not usually a sufficient basis to permit a lawyer to withdraw from representation); *NYSBA Ethics Op.* 598 (February 1989) client's inability to pay is not per se grounds for withdrawal but should be considered in context of amount of work already performed in comparison to work remaining, and steps necessary to protect client's interest [based on prior analogous Code].

[58] Depending on the circumstances a lawyer may seek to withdraw on the basis of non-payment of fees under the catch-all section, MR 1.16(b)(7).

[59] A lawyer who does not have a written retainer agreement may also be in violation of state professional responsibility rules or court rules. Lawyers should check their home state's requirements as to engagement letters, written retainer agreements and fee dispute resolution. *See, e.g.,* 22 NYCRR §1215 (requiring written letter of engagement with certain exceptions); Wash. D.C. Rule 1.5(b) providing that when " the lawyer has not regularly represented the client," the basis or rate of the fee, the scope of the lawyer's representation, and the expenses for which the client will be responsible shall be communicated to the client, in writing, before or within a reasonable time after commencing the representation. [Emphasis added].

additional services, the lawyer would have grounds for withdrawal under MR 1.16(b)(5). If the motion were denied, there might be circumstances in which the lawyer may be able to move to withdraw on the basis of "an unreasonable financial burden."

Failure to Keep in Contact with Lawyer— the Missing Client

Another common reason for withdrawal may be the client's failure to keep in contact with the lawyer and comply with a lawyer's reasonable requests for cooperation. For the lawyer to provide proper representation, a client needs to cooperate with his lawyer. At a minimum, the client has to be able or willing to meet with the lawyer or otherwise communicate with the lawyer. If a client fails to provide the lawyer with updated contact information, it will be difficult for the lawyer to provide diligent representation. Lawyers who cannot locate their clients are often faced with the ethical dilemma of still having to protect the interests of their clients without being able to communicate with them.

For the immigration lawyer, a missing client presents a myriad of problems. If a client fails to provide original documentation before a merits hearing, the lawyer may be asked to explain the client's failure to comply with this obligation when the client is not present, triggering tension between the lawyer's obligation of candor to the tribunal and duty of confidentiality. A client may need to respond to a request for evidence. A lawyer may need to advise his client of an interview date or a new deadline which may require additional cooperation from the client. When the client is missing, the lawyer may not be able to comply with the deadline or appear with the client as scheduled. For these reasons and others, the lawyer has the option of withdrawing under Rule 1.16(b) (5).

A number of state bar opinions have explored the problem created for the lawyer who has a missing client. Where the representation involves filing a lawsuit (or by analogy, filing papers necessary to obtain legal status), there is a tension between the lawyer's obligation to provide diligent and competent representation (MR 1.1 and 1.3) and the option of withdrawal. For example, if a client has not specifically authorized the lawyer to file suit or other legal paper and disappears, and the lawyer makes every reasonable effort to locate the client, he should be able to ethically withdraw and close the file.[60] If the client has provided explicit authority to file certain pleadings (and the lawyer has all the necessary substantive information and can comply with procedural rules), the lawyer probably should file the papers. But if he is still not able to locate the client, he has the option of seeking to withdraw after he files the papers.[61] When the client has given explicit authority to file the papers, but the lawyer does not have sufficient information, the lawyer should determine whether he can obtain the necessary information through other means before seeking to withdraw.[62] Where a missing client has retained a lawyer to file an appeal and has posted the required bond, the lawyer's duty of diligence would require that the lawyer file the appeal, but under Rule 1.16(b)(5) , he could then seek to withdraw.[63]

In the immigration context, it is particularly important for the client to advise the lawyer of any change of address within the U.S. or plans to leave the country. With respect to the latter, there may be adverse consequences to leaving the country and the lawyer might advise against it. In a matter pending in immigration court, the lawyer must be able to comply with court-ordered deadlines for filing

[60] *See, e.g.*, Illinois Advisory Op. 03-04 (1/04)(generally a lawyer is not obligated to continue with representation when client disappears (and even may be deemed to have in effect discharged lawyer) unless client has specifically authorized lawyer to do so and the lawyer has sufficient information to file the lawsuit or papers before seeking to withdraw).

[61] *Id.*

[62] *Id.*

[63] *Oregon Ethics Op.* 2005-33(where lawyer retained to file a civil appeal and missing client has posted bond, lawyer cannot refuse to continue with appeal; lawyer must seek and obtain leave to withdraw, citing *State v. Balfour*, 311 Or 434 which held that even when reasonable grounds exist, lawyer must give notice to or obtain consent from court in which appeal is pending).

documents or other papers. Even when the lawyer cannot locate the client, he cannot simply walk away – he must seek permission to withdraw.[64] That is so because, and we continue to reiterate the point, MR 1.16(c) requires that the withdrawing lawyer comply with other rules or law in matters before a tribunal. The lawyer would need to comply with the court's rules under 1.16(c) as well as taking reasonable steps to protect the client's interests under MR 1.16(d).

Even when a client's absence (or failure to pay legal fees) suggests that the client may no longer wish to pursue the matter, lawyers cannot simply abandon the client. Whether the lawyer views the client's absence as a constructive discharge, justifying mandatory withdrawal, or as a lack of cooperation, as grounds for permissive withdrawal, most court rules require that the lawyer to file a motion to withdraw.[65] Until such time as the lawyer is actually granted approval to withdraw, he still would be obligated to continue with the representation to the degree practical.[66]

A tribunal may require that the lawyer make reasonable efforts to locate a missing client. Search of local telephone directories, public records and Internet searches could suffice. More aggressive actions might include contacting relatives, friends, or employers while respecting the duty of confidentiality under Rule 1.6.[67] Although it is not likely to occur in the immigration context, when a lawyer has made every reasonable effort to locate the client and has moved to withdraw, a court may require the lawyer to publish notice of the motion to withdraw.[68]

As in all cases of withdrawal, where the matter involves a court or administrative proceeding, the lawyer may not just stop working on the matter. Under Rule 1.16(c) the lawyer is required to follow court rules and move to withdraw.[69]

MR 1.16(b)(6)

> **MR 1.16(b)(6)**
>
> (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

Just Can't Afford to Handle This Matter

A lawyer may be permitted to withdraw if the financial commitment required of the lawyer for continued representation is clearly greater than any reasonably foreseeable return. For example, if an immigration lawyer agreed to a flat fee (or to represent the client *pro bono*) based on the client's

[64] *See, e.g., Washington Ethics Op.* 2225 (2012) (in response the immigration lawyer's inquiry, client's failure to contact lawyer or otherwise provide contact information is failure to cooperate under Rule 1.16(b)(5) or could also be grounds for withdrawal under Rule 1.16(b)(6)(where representation has become unreasonably difficult for the lawyer).

[65] *See Bennett v. Mukasey*, 525 F.3d 222(2d. Cir. 2008); *In re David Yan*, 390 Fed. Appx. 18, 2010 WL3154111 (C.A.2).

[66] Washington Op. 2225 (even when motion to withdraw pending, if missing client previously authorized particular action and lawyer has necessary information and procedural ability to file papers, he must do so until motion granted).

[67] Kentucky Bar Assoc. E-433 (May 2012) (opinion suggests that disclosure of lawyer-client relationship in effort to locate missing client might be deemed "implied authorization" to reveal confidential information under Rule 1.6).

[68] South Dakota Bar Op 93-11 (September 1993) (in divorce matter, lawyer who cannot locate client may be permitted to withdraw on condition that he provide public notice of motion to withdraw) .

[69] *See, e.g.,* Missouri Bar Op. 20000172 (2000)(lawyer cannot unilaterally stop working on a legal matter when client fails to pay fee under duty of diligence (MR 1.3), but must seek to withdraw under Rule 1.16); *Oregon Ethics Op.* 2005-33(where lawyer retained to file a civil appeal and missing client has posted bond, but still owes past-due fees, lawyer cannot refuse to continue with appeal; lawyer must seek and obtain leave to withdraw, citing *State v. Balfour*, 311 Or 434 which held that even when reasonable grounds exist, lawyer must give notice to or obtain consent from court in which appeal is pending).

presentation of the facts and there turned out to be unanticipated complications requiring significantly more time and resources than the lawyer had contemplated, under Rule 1.16(b)(6), the lawyer may seek to withdraw. If the matter were before a tribunal, in deciding whether to approve the withdrawal, the court would consider the potential harm to the client weighed against the lawyer's actual ability to provide competent and diligent service. Often, the failure to pay a fee, which may be deemed a client's failure to fulfill an obligation under MR 1.16(b)(5), may also place an unreasonable financial burden on the lawyer in light of the lawyer's resources.[70]

Just Can't Deal with This Client

There are many ways in which a client can make a lawyer's work-life miserable; not paying the lawyer's fee is only one of them. But after years of experience, many lawyers develop practices designed to address the varied needs of their clients. Some lawyers are constantly training their support staff to be responsive to calls from clients or unexpected office visits; some designate a particular paralegal to act as a liaison between a particular client and the lawyer. Some lawyers prepare and distribute brochures to deal with frequently asked questions.

Nevertheless, when a lawyer has a client who insists on speaking with him personally day after day to get a status update, fails to keep scheduled appointments but shows up after business hours expecting to meet with the lawyer, or threatens to sue for malpractice every time a problem arises, it would be fair to describe the representation as "unreasonably difficult." Other examples might include a client who lies to his lawyer or otherwise seems untrustworthy, or habitually fails to provide necessary information or documents which cannot be obtained from any other source, while at the same time trying to dictate legal strategies.[71]

MR 1.16(b)(7)

> **MR 1.16(b)(7)**
>
> (7) other good cause for withdrawal exists

Because it is impossible to articulate all of the many reasons a lawyer might wish to withdraw from a representation, MR 1.16(b)(7) provides the catchall "good cause." What constitutes good cause in one matter may not be so in another. A lawyer-client relationship may be marked by antagonism or simple dislike that falls short of being repugnant or creating an unreasonable difficulty. A lawyer may have a personal obligation, such as care of a family member, which will interfere with the lawyer's ability to continue the representation or commit to a long trial or appeal. Whether or not a court would approve a motion to withdraw on any of those grounds will depend on the circumstances.

The Client with Diminished Capacity

One area that seems appropriate for the "good cause" withdrawal is the situation in which the client has a severely diminished capacity to make legal decisions or has some type of mental impairment which interferes with the lawyer-client relationship. The issue of the client's diminished capacity is addressed in Comment 6 to MR 1.16 insofar as it relates to mandatory withdrawal after discharge. In

[70] *See, e.g., Washington Ethics Op.* 2225 (2012)(failure to pay fees may be basis for withdrawal under Rule 1.16(b)(5) and also under Rule 1.16(b) because under certain circumstances failure to pay may cause unreasonable financial burden for lawyer).

[71] *See, e.g., Whiting v Lacara*, 187 F.3d 317 (2d Cir. 1999)(client's attempted dictation of legal strategies under the threat that client would sue the lawyer if he refused to go along with the client rendered representation "impossible" and proper grounds for termination under New York's then analogous Code).

such situations, the comment advises that the lawyer should consider whether the client "lacked the legal capacity to discharge the lawyer" by making a special effort to help the client understand the potential adverse consequences of discharge.[72]

In cases not involving discharge, a lawyer may come to the conclusion that she personally cannot accommodate a client's particular impairment, but that another lawyer could. In such cases, the court would be inclined to grant the withdrawal, as long as the client was able to retain new counsel. But when it is not just a question of matching the impaired client with the right lawyer, the lawyer who seeks to withdraw must also comply with MR 1.14, which governs the obligations of a lawyer when the impairment is such that the client lacks the mental or physical capacity to make *any* legal decisions even with the help of a competent and understanding lawyer.[73] Under this rule, the lawyer should do her best to maintain a normal lawyer-client relationship, but she may take "reasonably necessary" protective measures which would include consulting with other professionals and seeking the appointment of a guardian. Disclosure of otherwise confidential information would likely be permitted under Rule 1.6 on the basis of implied consent.[74]

In the immigration context, the representation of unaccompanied minor children or others with diminished capacity presents special challenges that lawyers need to be prepared to address by engaging additional resources to maintain a normal lawyer-client relationship.[75]

MR 1.16(c)

> **MR 1.16(c)**
>
> (c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

Withdrawal in Matters Pending Before a Tribunal

Rule 1.16(c) addresses withdrawal in matters pending before a tribunal, and applies to both mandatory and optional withdrawal. It recognizes the tribunal's authority to approve withdrawal or order a lawyer to continue the representation. For the immigration lawyer, as previously discussed, any matter before the USCIS, Immigration Court, BIA or a federal court would be deemed a tribunal.

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[72] *See* Comment 6 to Rule 1.16.

[73] Rule 1.14 provides:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

[74] *See Vermont Ethics Op.* 2006-1 (where lawyer has reasonable belief that older client was mentally unstable based on accusations of theft of her possessions directed at others and accusations that lawyer stole her "papers and records " and lawyer concerned that client may file disciplinary complaint, Rule 1.14 provides options; disclosure of confidential of information permitted under Rule 1.6 based on implied consent and may be grounds for withdrawal under Rule 1.16 for good cause shown.)

[75] *See* the AILA Practice Advisory *Ethical Issues in Representing Children in Immigration Proceedings*.

Courts have wide discretion regarding motions to withdraw. Significant factors are harm to the client and the efficient administration of justice. If a motion to withdraw is made on the eve of trial or even close to trial, the client likely would not have enough time to retain new counsel.[76] For that reason, courts rules may require that in addition to providing the reasons for the motion to withdraw that the lawyer also explain the procedural posture of the case including the next calendared hearing or other event deadline.[77]

A lawyer who has filed a notice of appearance before the Immigration Court or the BIA seeking to withdraw would be subject to the requirements set forth in 8 CFR §1003.102(q)(3). This rule provides that the immigration lawyer must complete all matters undertaken for a client unless the client terminates the lawyer's representation or the lawyer obtains permission to withdraw in compliance with applicable rules and regulations."[78]

The specific procedures for immigration lawyers seeking to withdraw are spelled out in Chapter 2.3 of the Immigration Court Practice Manual.[79] The Manual states that when a lawyer wishes to withdraw (implicitly before his client has obtained new counsel), he must submit a "written or oral" motion to withdraw, containing the following information: (1) the reason(s) for the withdrawal (2) the client's last known address; (3) the lawyer's representation that he has provided notice to the client or if not, an explanation as to why not; (4) evidence of the client's consent or, if none, why the lawyer could not provide any; and (5) evidence that the lawyer has contacted the client or attempted to in order to apprise the client of all upcoming deadlines, including the next scheduled hearing, and necessity and consequences of failing to meet such deadlines or appear at scheduled hearings.[80]

The manual advises that the court will consider the time remaining before the next hearing and the reasons for the withdrawal. The lawyer who has filed the motion must remain as attorney of record, comply with all court deadlines for submission of documents and attend all hearings until the court makes a determination.

When a client retains a new lawyer in a pending matter (implicitly before the prior lawyer has moved to withdraw), the new lawyer must file a motion for substitution which must be granted before the new lawyer can formally appear. Until then the prior lawyer must continue as attorney of record. If the motion for substitution of counsel is granted, prior counsel need not file a motion to withdraw.

While the EOIR has an established procedure for lawyers seeking permission to withdraw, there are no similar procedures for lawyers appearing on behalf of foreign nationals seeking immigration benefits

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[76] *U.S. v. Pointer*, 17 P.3d 1070(7th Cir 1994)(in criminal case, court appointed lawyer's motion to withdraw and to appoint new counsel made 4 days before trial denied on basis of timing and only mere allegations that client did not trust lawyer and that lawyer did not understand the case very well); *Hammick v. Hammick* ,803 A.2d 373 (Conn. App. Ct. 2002)(court held in abeyance wife's lawyer's motion to withdraw on day of trial presumably on basis of lack of client cooperation, taking extra care to make sure that lawyer adequately represented and skillfully protected client's interests without receiving cooperation from her).

[77] *See, e.g.*, Local Civil Rule 1.4 "Withdrawal or Replacement of Attorney of Record" for the Southern and Eastern Districts of New York which provides:

> An attorney who has appeared as attorney of record for a party may be relieved or displaced only by order of the Court and may not withdraw from a case without leave of the Court granted by order. Such an order may be granted only upon a showing by affidavit or otherwise of satisfactory reasons for withdrawal or displacement and the posture of the case, including its position, if any, on the calendar, and whether or not the attorney is asserting a retaining or charging lien. All applications to withdraw must be served upon the client and (unless excused by the Court) upon all other parties.

[78] *See* 8 CFR §1003.102(q)(3).

[79] *See* Chapter 2.3 of the Immigration Court Practice Manual at Appendix A.

[80] 8 CFR §1003.17(b) provides that "[w]ithdrawal or substitution of an attorney or representative may be permitted by an Immigration Judge during proceedings only upon oral or written motion submitted without fee."

at the USCIS. The DHS rule, 8 CFR §292.4, provides that when a practitioner submits a Notice of Entry of Appearance, Form G-28, with DHS, "[the] appearance will be recognized by the specific immigration component of DHS in which it was filed until the conclusion of the matter for which it was entered...Substitution may be permitted upon written withdrawal of the attorney or accredited representative or upon the filing of a new form by a new attorney or representative."

It would appear that under 8 CFR §292.4 a lawyer's representation is not deemed terminated until either the conclusion of the matter or when a new lawyer substitutes into the matter by filing a new form G-28; it is also clear that USCIS permission is not required. Despite the limitation in §292, a lawyer must be able withdraw if required or permitted to do so MR 1.16. Until there is more clarity from the DHS, we suggest that the lawyer notify the agency in writing regarding the withdrawal rather than do nothing. Notification of the withdrawal of representation, even when there is no substitution of counsel, will potentially protect a lawyer later should the client persist in criminal or fraudulent conduct. It will also protect the lawyer if the new lawyer makes a mistake.

While it is not required under MR 1.16 (or even addressed), when a matter has been concluded by its own accord, such as when the client prevails in a removal proceeding, the prudent and conscientious immigration lawyer should consider advising the client in writing that he is no longer representing the client. The lawyer may also consider notifying the immigration court, UCSIS or DHS that as a result of the matter being concluded, he is no longer the attorney of record. This may serve to protect the lawyer should the UCSIS or DHS move to reopen the matter and serves a motion on the lawyer. Similarly, lawyers may also consider seeking withdrawal after a matter has been administratively closed, for example, on the basis of deferred action or DACA availability.

MR 1.16(d)

> **MR 1.16(d)**
>
> (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law.

Notice to Client of Intent to Withdraw

Regardless of whether withdrawal is mandatory or permissive, MR 1.16(d) requires that a lawyer withdraw in a way that reasonably protects her client's interests. Unlike Rule 1.16(c) which is limited to matters before a tribunal, Rule 1.16(d) applies to all legal matters. The protection of the client's interest includes providing adequate notice of the lawyer's intent to withdraw.[81] A lawyer's failure to provide notice of the withdrawal or a reasonable time for the client to retain new counsel, whatever the reason, is tantamount to abandonment of a client. This not only violates Rule 1.16(d), but also at a minimum

[81] *In re Loiseau*, No. 49S00-0201-DI-17, 2002 Ind. LEXIS 806 (Ind. Oct. 22, 2002) (among other violations in involving major neglect, immigration lawyer failed to provide client with adequate notice of his intent to withdraw and, while motion was pending with court failed to appear as scheduled hearing); *Fla. Bar v. Elster*, 770 So. 2d 1184 (Fla. 2000) (immigration lawyer deemed to have abandoned client by doing little or no work, failing to provide notice to the client, return the file or the unearned fee, and he violated Rule 1.16(d) among others.]; *Grievance Comm'n of Md. v. Shakir*, 427 Md. 197 (Md. 2009)(lawyer "neither deposited the money into an attorney trust account nor filed ultimately the Application for Asylum," then failed to return the unearned portion of the fee when representation was terminated and in non-immigration proceedings, lawyer failed to appear, failed to notify client he would not appear, and did not refund unearned fees upon termination in violation of Rule 1.16(d)).

would likely violate Rule 1.3 (diligence) as well. For example, a lawyer cannot escape the requirements of Rule 1.16(d) by simply passing the client's matter to another lawyer without the client's consent.[82] A lawyer cannot withdraw from representation by simply leaving the country even when it may be purportedly necessary without taking steps to protect the client.[83] Nor would personal problems, or even severe depression, excuse a lawyer from complying with the requirements of MR 1.16(d), in the same way that such impairments do not excuse violations of other Model Rules.[84] An otherwise conscientious and competent lawyer may find himself subject to discipline if he fails to comply with the notice requirements of Rule 1.16.[85]

Return of Client Files, Property and Unearned Fees

Under MR 1.16(d), certain responsibilities continue beyond the point of termination. This would include situations in which the client discharges the lawyer, the lawyer withdraws or when the representation is concluded in the normal course. In order to protect the client's interests when the representation is terminated, a lawyer must return the client's files and property as well as the unearned portion of any advance fee or payment for expenses not incurred.[86]

A client's need for his file is particularly important when his lawyer withdraws from representation in a matter before a tribunal. For one thing, the client's new lawyer needs the file in order to properly represent the client.[87] Although not a universal position, the duty to turn over a file upon withdrawal has been held to apply even when a lawyer has previously provided copies of pleadings or other important

[82] *In re Barrera*, 124 N.M. 220 (N.M. 1997)(lawyer who failed to provide competent legal services in connection with asylum application, violated, among other rules, New Mexico's Rule 16-116(D) (same as MR 1.16(d by turning over the client's file to another lawyer, who turned the file over to yet another lawyer, who eventually returned file to the client; court also ordered lawyer to return unearned fee).

[83] *Office of Lawyer Regulation v. Olaiya*, 635 N.W.2d 283 (Wis. 2001)(an immigration lawyer left country in the middle of matter, without notice to his clients, was not available to handle a RFE or answer client's questions, and did not return file to client after client retained new counsel or return unearned fee, deemed to have abandoned case and failed to protect client's during that period)

[84] *Attorney Grievance Comm'n of Md. v. Heung Sik Park*, 427 Md. 180 (Md. 2012)(lawyer who failed to communicate with client, ignored client's repeated requests for status updates, and failed wholly to provide effective services was deemed to have abandoned client without notice; personal problems and severe depression were not mitigating circumstances).); *Disciplinary Counsel v. Mead*, 127 Ohio St. 3d 393 (Ohio 2010)(lawyer refused to return client's file to the client or her new counsel, after being terminated for filing late appeal which was dismissed, as well as fee paid for the appeal, found to have violated Rule 1.16(d); notwithstanding apparent mental health problems and involvement of Ohio LAP).

[85] *In re Loiseau*, No. 49S00-0201-DI-17, 2002 Ind. LEXIS 806 (Ind. Oct. 22, 2002) (among other violations in involving major neglect, immigration lawyer failed to provide client with adequate notice of his intent to withdraw and, while motion was pending with court failed to appear as scheduled hearing); *Fla. Bar v. Elster*, 770 So. 2d 1184 (Fla. 2000) (immigration lawyer deemed to have abandoned client by doing little or no work, failing to provide notice to the client, return the file or the unearned fee, and violated Rule 1.16(d) among others.]; *Grievance Comm'n of Md. v. Shakir*, 427 Md. 197 (Md. 2009)(lawyer "neither deposited the money into an attorney trust account nor filed ultimately the Application for Asylum," then failed to return the unearned portion of the fee when representation was terminated and in non-immigration proceedings, lawyer failed to appear, failed to notify client he would not appear, and did not refund unearned fees upon termination in violation of Rule 1.16(d).

[86] *See Allison v. Comm'n for Lawyer Discipline*, 374 S.W.3d 520 (Tex. App. 2012)(where client ordered deported because of lawyer's neglect, and lawyer failed to provide documents pertaining to deportation, to discuss appeal, or provide copy of file until after client hired new counsel, lawyer found to have violated TX Rule 1.15(d) [same as MR 1.16(d)] and ordered to pay restitution; fact that lawyer's actions may not have had effect on ultimate disposition of case was immaterial to determining whether lawyer took reasonable steps to protect the client's interests upon withdrawal); *Hines v. Comm'n for Lawyer Discipline*, 28 S.W.3d 697, 701-02 (Tex. App.Corpus Christi 2000) (finding that TX Rule 1.15 was violated when lawyer failed to keep client reasonably informed, failed to file an appeal, and did not make it clear to the client that he had terminated his representation of her); *Cannon v. State Bar*, 800 P.2d 911 (Cal. 1990) (court found repeated violations of ethical rules concerning the return of unearned fees and withdrawal without taking reasonable steps to avoid foreseeable prejudice to the client ([Cal.] Rule 3-700) [similar to MR 1.16(d)], in addition to a failure to perform legal services competently ([Cal.] Rule 3-110), by "repeatedly refused to return unearned fees even [after termination and where]clients obtained arbitration judgments against him and consistently failed to maintain communications with clients."

[87] *In re Ohaebosim*, No. 107,680, 2012 Kan. LEXIS 376 (Kan. June 29, 2012).

(lawyer who failed to turn over complete file to new lawyer hired to handle appeal in timely fashion violated Rule 1.16(d)).

documents during the course of the representation. This was the case with an Arkansas immigration lawyer who was subject to disciplinary charges. In finding that the lawyer had violated Rule 1.16(d) for refusing to provide the client's entire file, the court found that the lawyer was required to provide duplicates of his "end [work] product (*i.e.*, pleadings, correspondence, and other documents exposed to the 'public eye') upon a client's request after the termination of representation, regardless of whether originals were provided to the client in the course of representation." [88] Because rules governing the fees lawyers may charge for copying files may differ, lawyers should check their state or local rules.

It is worth noting that the task of providing clients with copies of files has been made easier by technology. Where files are maintained electronically they may be turned over via a flash drive, disc, or even by secure email

Retaining Liens

Rule 1.16(d) qualifies the lawyer's obligation to return files or property as that "to which the client is entitled." Although the term "entitled" is not defined in the rules, it is read to mean legally entitled. For that reason a lawyer may assert a "retaining lien" on the client's files if the client has failed to pay outstanding fees for the work performed.[89] However, a retaining lien may not interfere in a material way with the client's interests (to cause "prejudice") as expressed MR 1.16(d). By the same token, there may be documents in the file to which the client is not entitled, in particular, documents that contain third party confidential information and documents prepared solely for the benefit and use of the lawyer or law firm, *e.g.*, internal memoranda or notes to file.[90]

In the immigration context, a lawyer may not decide to refuse to return an H-1B or L-1 approval notice, which is required for a visa application, on the basis of a retaining lien when the client has refused to pay outstanding fees. The client's impaired right to travel may be deemed sufficient prejudice that supersedes the general rights of a retaining lien. Immigration lawyers have been disciplined for such conduct because under MR 1.16(d) prejudice to the client trumps a lawyer's legitimate exercise of a retaining lien.[91]

File Maintenance

Implicit in the duty to return files in Rule 1.16(d) is the lawyer's duty to properly maintain a client's file in the first instance.[92] A lawyer may not avoid the obligation to return a client's file under 1.16(d) by claiming he didn't keep one or that the one he kept was incomplete.

The New York State Bar Association recently issued a report on Immigration Practice recommending that immigration lawyers keep the following documents in the client's file:

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[88] *Travis v. Sup. Ct. Comm. on Prof'l Conduct*, 306 S.W.3d 3 (Ark. 2009)(immigration lawyer who had provided copies of applications, notices from the USCIS, an order from the Immigration Court, and copies and originals of other documents to the client, was found to have violated Rule 1.16(d) because he refused to provide any further copies upon termination).

[89] MR 1.8(i)(1) provides that "a lawyer may acquire a lien authorized by law to secure the lawyer's fee or expenses."

[90] *See, e.g., Sage Realty Corp v. Proskauer Rose Getz & Mendelson*, 91 N.Y.2d 20(1997)(client has presumptive access to the lawyer's file except for two narrow exceptions: documents which may violate lawyer's duty of confidentiality to a third party and documents prepared for internal review and use)

[91] *See, e.g., In re Lim*, 210 S.W.3d 199 (Mo. 2007)(lawyer who withheld Labor Certification after discharge on the basis that it was lawyer's property because client had not paid full fee violated 1.16(d)); *People v. Walker*, 135 P.3d 71 (Colo. 2005)(among other violations including gross neglect over a period of two years, lawyer who failed to turn over client's file after client deported on basis of retaining lien found to have violated 1.16(d)).

[92] *See In re Ohaebosim*, 279 P.3d 124 (Kan. 2012) (lawyer failed to employ the requisite thoroughness and preparation in his representation of the client in removal proceedings in violation of *KRPC 1.1*; among other things, incomplete file).

(a) all paper and electronic correspondence to and from the relevant government agencies;

(b) all paper and electronic evidentiary records including documents, certificates, letters of support, declarations or affidavits, and any other records—from the client , his or her friends, the A file, government agencies, criminal/family/other courts, medical professionals, and any individuals, agencies and institutions;

(c) all correspondence, motions, briefs, evidence and other attachments filed with the relevant court/agency or sent to/from opposing counsel; and

(d) all notices, correspondence decisions received from the relevant court/agency.[93]

A prudent and competent lawyer, who returns the client's file, will generally want to keep a copy to protect her own interests as well and should be able to do so over the objections of the client.[94]

Return of Unearned Fees: Interplay between MR 1.16(d) and MR 1.15

Under MR 1.16(d) upon termination of the representation, a lawyer must return unearned fees or monies paid for expenses not incurred irrespective of whether the withdrawal is mandatory or optional. This is consistent with the notion that unearned fees or advances for expenses are the client's property and should be returned like any other property the lawyer has held on the client's behalf. Presumably to safeguard the advance payments and insure their return, Rule 1.15 ("Safekeeping Property") provides, in part, that a lawyer must deposit all advance payments for fees and expenses into his trust account which the lawyer may not withdraw until the fees are earned or the expenses incurred.[95] *As in the case of every Model Rule to which we refer, lawyers are advised to check their home state's version of MR 1.15, here in particular, as it relates to the handling of advance payments for fees or expenses.*[96]

For many immigration lawyers who charge on a flat-fee basis calculating the unearned fee may present problems. For that reason, immigration lawyers should consider, at a minimum, keeping an informal log of time spent and expenses incurred.[97] Where an immigration matter involves several different steps—as is

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[93] *See* New York State Bar Report of the Special Committee on Immigration Representation.

[94] *See NYSBA Ethics Op.* 780 (2004) (lawyer may keep copy of client's file over client's objections because lawyer has interest in the file, *e.g.*, lawyer may need file to collect fee or defend against accusation of wrongdoing under Rule 1.6(5)).

[95] MR Rule 1.15 provided in pertinent that:

> (c) A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred…;
>
> (d)… Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person,

[96] Although all state versions of MR 1.16(d) require that a lawyer return unearned fees and monies for expenses not incurred, there are variations as to how advance fee payments are to be maintained under some state versions of MR 1.15. For example, New York's version of Rule 1.15, as well as the comments, make no reference to the treatment of advance payments for fees and expenses, but the rule does require that funds belonging to a client or third party must be deposited in the lawyer's trust account. As a result, the practice in New York is that absent a separate agreement with the client or third party requiring that such funds be held in a trust account, advance payments, whether based on a flat fee or retainer against an hourly billing rate, should be deposited in the lawyer's operating account. Since fees are not deemed to be client funds, the lawyer may spend the money as he chooses. *See* New York Rule 1.15. Minnesota's Rule 1.15 requires that all unearned advance fees be deposited in the lawyer's trust account, but provides that an advance flat fee may be deemed the lawyer's property to be used by the lawyer, if there is a written agreement between the client and the lawyer so providing. *See* Minn. RPC 1.15. Washington DC's Rule 1.15(d) provides that all advance fee payments of unearned fees are to be treated as client property unless the client gives informed consent to a different arrangement.

[97] *Attorney Grievance Comm'n of Maryland v. Gardner*, 2013 Md. LEXIS 69 (Md. Feb. 11, 2013) (immigration lawyer violated Rule 1.16 because he "did not accurately account for all of [client's] fee payments and did not refund any of the fees collected.").

often the case—an immigration lawyer may want to attribute a value for each step, which may be included in any retainer agreement.

Disciplinary complaints involving neglect and incompetence often include a claim that the lawyer failed to return unearned fees.[98] Many foreign nationals have limited funds and may need the returned fees to retain another lawyer. An immigration lawyer was found to have violated 1.16(d) when he failed to return an unearned fee after his client decided not to continue in the matter. Perhaps in an effort to placate the client, the lawyer provided the client with a check for most of the fee but the check did not clear.[99]

The fact that a lawyer no longer had the money to return the fee did not excuse his conduct, where he failed to deposit the advance fee payment in his trust account, as required under his home state's Rule 1.15, and spent the money.[100] A lawyer is also not excused from returning an unearned fee based on the client's agreement to a "non-refundable fee."[101]

Anything Else the Lawyer May Need to Do to Protect Client's Interests Under MR 1.16(d)

Other measures that a lawyer may take to protect a client's interests upon withdrawal include being available to the new lawyer who may have questions about the file and the procedural posture of the matter. The lawyer also may need to confer with his soon to be former client about the status of his matter as well, especially if there are imminent deadlines for the filing of papers.[102]

D. Hypotheticals

Caveat: The information in this section reflects the Committee's views and does not to constitute legal advice.

Hypothetical One: "Lost in Action…Where Are You?"

Michael hired Attorney Louis to represent him in removal proceedings in January 2014 and the lawyer filed a notice of appearance. Due to the backlog in the Immigration Court, Michael's individual hearing was not scheduled until early 2016. At the time of hire, Michael paid Louis an initial retainer and agreed to a payment plan for the balance of the fee.

Louis promptly sent Michael drafts of the necessary application forms including an I-589, application for Asylum and form E-42B, application for Cancellation of Removal as a Non-Permanent Resident.

[98] The line between a good faith fee dispute and failure to return an unearned fee claim may not always be clear.

[99] *In re Disciplinary Proceeding Against Perez-Pena*, No. 200,428-8, 2007 Wash. LEXIS 715 (Wash. Oct. 4, 2007)(sanction and more?); *see also People v. Carder*, No. 10PDJ055, 2011 Colo. Discip. LEXIS 25 (Colo. March 11, 2011)(among other violations, failed to return unearned fee after client terminated for neglect); *People v. Nelson*, No. 00PDJ089, 2002 Colo. Discipl. LEXIS 5 (Colo. Jan. 8, 2002)(among other violations including misappropriation of funds, lawyer who essentially abandoned client and did not return the unearned funds or files upon clients request, was disbarred).

[100] *Fla. Bar v. Whitney*, No. SC11-1135, 2013 Fla. LEXIS 2637 (Fla. Dec. 5, 2013) (Immigration lawyer failed to take steps to the extent reasonably practicable to protect a client's interest upon termination of representation when he deposited $15,000 flat fee into personal account, spent the money, and refused to return unearned fee, and then compounded his misconduct by demanding that additional funds be paid).

[101] *In re Karlsen*, 778 N.W.2d 522 (N.D. 2008)(lawyer who collected non-refundable fee, neglected immigration matter by not completing work and did not return unearned portion of the fee and also engaged in other misconduct including dishonesty disbarred)

[102] Whether or not the lawyer would be able to charge for these services depends on the circumstances. Generally if the lawyer was the one to terminate the representation, she would bear the cost of providing these additional services, absent prior agreement with the client otherwise.

However, thinking he had time, Michael ignored the drafts as well as his payment plan for the remainder of his fee.

Attorney Louis tried to contact Michael several times to work on his drafts and remind him that he had fallen behind on the fee payments. Michael did not respond to the calls, emails or letters.

Analysis

Can lawyer Louis successfully withdraw or has he violated Rule 1.16?

Under MR 1.16(b)(5) a lawyer is permitted to withdraw if his client substantially fails to meet his obligations. To provide diligent and competent representation, a lawyer needs a certain degree of cooperation from the client. Paying for the legal services rendered is usually one of those obligations. Being available to the lawyer to confer on the matter and in particular to review draft documents to make sure that the information provided is correct is another necessary obligation. So it would appear that the lawyer has the grounds to seek withdrawal.

But MR 1.16(b)(5) also requires that the lawyer warn the non-cooperating client that the lawyer will move to withdraw if the client does not cooperate by (1) at least responding to the lawyer to let him know if he wants to continue with the representation and (2) if so, agreeing to review the drafts and provide input. As far as the fee payments are concerned, the client should be given an opportunity to explain why he has stopped making the payments. Is it because he wants to stop the representation, or that he doesn't have the money right now or just decided that he doesn't want to pay anymore? Sometimes, a client's inability to pay, without more, is not sufficient. A factor to be considered here is whether the amount of money the client paid the lawyer covers the fees for drafting the documents. If they did, then the failure to pay the balance of the fee under the payment plan most likely would not be deemed sufficient.

Further, since this matter is before a tribunal, the lawyer will have to comply with Immigration Court rules as to the requirements of withdrawing, which as reflected in Ch. 2.3 of the Immigration Court Practice Manual would require proof of notice to the client of the intent to withdraw, among other things. **see text accompanying footnotes 78-79.

Since this is a situation in which the lawyer has reached out to the client to no avail, the lawyer will need to document his efforts to reach his client, in the event that the court makes any inquiries and may want the lawyer to do more. What efforts a lawyer should take to locate the client may depend on the circumstances. Here, it seems strange that the client has not responded to the calls, emails and letters. The lawyer may need to show that he did a basic Internet search to verify the contact information or reached out to a known friend or relative of the client with whom the lawyer had contact, keeping in mind the lawyer's duty of confidentiality.[103]

In addition to complying with Rule 1.16(c), the lawyer must also comply with Rule 1.16(d). The notice requirements under court rules overlap with 1.16(d)'s notice requirements, but the lawyer also is required to return any unearned fees and any advance unused filing fees. When a lawyer has made reasonable efforts to locate the client to no avail and there is money due the client, the lawyer may have to hold it in a trust account or take whatever legal steps are permitted to transfer the money to a third party. The lawyer is also required to provide the client's file, but here the client hasn't asked for it or

[103] There is no ethical rule that requires a lawyer to take extraordinary measures to locate a missing client when moving to withdraw, *e.g.*, hiring private investigator or even paying for more advanced internet searches. However, that does not mean that a judge may not so inquire.

otherwise contacted the lawyer. So the lawyer will probably have to hold on to the file until he hears from the client and consider what further action to take after the master calendar date.

Since Rule 1.16(d) obligates the lawyer to take reasonable steps to protect the client's interests, the lawyer would likely need to advise the client of the procedural posture of his case. Normally, the Court would set the date of the individual hearing and dates for submission of certain evidence or other papers. Although the deadlines and court date are not imminent, the lawyer should make every effort to apprise the client of what he needs to do.

However, as a practical matter the responsibilities discussed above under 1.16(d) cannot be accomplished if the lawyer cannot locate the client.

So, what's the bottom line? In this scenario, it does not appear that the lawyer wrote to Michael to warn him of his intent to withdraw if he did not contact the lawyer regarding the drafts or pay outstanding fees as is required by MR 1.16(b)(5). However, since the reason for the withdrawal is, in the first instance, that Michael has not responded to the lawyer's calls, emails and letters, it is doubtful that any disciplinary authority would find that he violated MR 1.16(5) or arguably failed to take sufficient steps to locate the client in the first instance. However, because the court has discretion as to whether withdrawal should be granted, the Court might require the lawyer to document that he has warned the client at the last known address and that either it was returned undelivered or that the client did not otherwise respond. Otherwise, it does not appear that the lawyer violated Rule 1.16.

Hypothetical Two: The Client's Asylum Narrative—True or False, or I Just Don't Know

Susan hires Lawyer Gloria to represent her in an I-589 application for asylum, withholding of removal and protection under the Convention against Torture before the Immigration Court.

Susan tells Lawyer Gloria of past torture and her fear of future persecution. Lawyer Gloria having represented many clients in asylum matters considers parts of the client's story questionable. Gloria also knows that Susan went to three other immigration lawyers, but none agreed to represent her, and Susan has had some dealings with "notarios" before deciding to seek counsel.

Because the Judge may have the same concerns, Lawyer Gloria tells the client that it would be important to find an expert to testify about country conditions which would help support Susan's story. Susan flat out refuses, telling the lawyer that she simply can't afford to pay any additional expenses, even before Gloria mentions whether the expert would charge a fee. Lawyer Gloria also asks for documentary evidence and witnesses to corroborate the asylum claim. Susan says she does not have any documents and she has no witnesses.

Lawyer Gloria decides to file a motion to withdraw with the Immigration Court because she does not want to run the risk that she might be helping the client commit immigration fraud. Susan cries at the hearing and begs the Judge to keep her lawyer in the case. The Judge orders Lawyer Gloria to stay in the case and proceed with the asylum case.

Analysis

What should Gloria do?

This scenario addresses the contrasting circumstances under which a lawyer is <u>required</u> to withdraw on the basis that the representation will result in the violation of a rule or law and a lawyer is <u>permitted</u> to withdraw, as well as the lawyer's duty of candor toward a tribunal.

Is the lawyer permitted to withdraw under Rule 1.16?

Whether withdrawal is required or permitted here depends on the lawyer's state of mind as to knowledge. Here, the lawyer believes that certain parts of Client B's story are questionable and she is disturbed that the client says she cannot provide any corroborating evidence. The fact that three other immigration lawyers declined to represent is not helpful either. But none of those factors would be sufficient to establish actual knowledge and, thus, the lawyer would not be required to withdraw under Rule 1.16(a). Those factors are, however, red flags that something may be amiss.

A lawyer cannot avoid mandatory withdrawal or the duty of candor to the tribunal by simply looking away. The lawyer needs to make some effort to address her concerns. She could confront the client with her suspicions and explain that if she has concerns an adjudicating authority may also have such suspicions. The lawyer should warn the client about the consequences of fraud not only to her immigration matter, but also as to the risk of criminal prosecution. The lawyer could also ask the client to waive the lawyer-client privilege with respect to her prior lawyers so that the lawyer can find out why those lawyers declined representation and, in particular, to find out if the client told them the same story. If the client says no – that might be sufficient along with the other red flags to support a reasonable belief of the fraud, but it still would not support knowledge. The only way that the lawyer may obtain actual knowledge here would be if the client admitted lying or if the lawyer came into possession of other incontrovertible evidence, such as a writing, that proves fraud.

Here the best we can come up with is "reasonable belief" which gives the lawyer the option of withdrawing under 1.16(b)(4).

When Gloria has a reasonable belief that her client is committing immigration fraud and the court denies the motion to withdraw and orders the lawyer to stay in the case, does Lawyer Gloria violate Rule 1.16 by continuing the representation?

No. As discussed above when a lawyer only has a reasonable belief of the fraud, she is not required to withdraw under Rule 1.16(b)(a). Nor would she be required to disclose the facts that caused her to believe there is a fraud on the tribunal under Rule 3.3. (The lawyer's duty of confidentiality is only trumped by the duty of candor when the lawyer has knowledge).[104] Under Rule 1.16(c) a lawyer is obligated to follow the rules of the tribunal as to withdrawal and, as in the case here, if the court orders the lawyer to stay on the case, she must comply.

How should the lawyer proceed? The lawyer has to stay on the case and comply with the other rules of professional responsibility, including by providing diligent and competent representation. The lawyer is still subject to the withdrawal and duty of candor rules, going forward, so that if she did obtain actual knowledge of fraud during the course of the representation, she would be required take remedial measures to prevent the fraud, including disclosure to the tribunal. The lawyer may also need to withdraw under Rule 1.16(a) because of the resulting conflict of interest.

[104] A minority of states have not adopted MR 3.3's requirement that the lawyer disclose the fraud if all remedial measures are unsuccessful. In particular, several states are clear that a lawyer must hold inviolate the confidences of his client. Those states are California, Tennessee, Oregon, and the District of Columbia. In each of those states disclosure of the false evidence or testimony is not included in the remedial measures the lawyer may take. Two other states vary somewhat from MR 3.3's duty of candor, but in different ways. New Jersey's Rule 3.3 imposes an additional disclosure obligation on the lawyer as to facts the omission of which would mislead a tribunal, regardless of whether the lawyer is appearing ex parte or with opposing counsel present. North Dakota's Rule 3.3 includes disclosure as a remedial remedy, but not when the false evidence is introduced through the client's testimony. Immigration lawyers admitted in the above states, or those that may practice immigration law in one of them, should be aware of the differences. (For a more detailed discussion of the state variations regarding MR 3.3, *see* Chapter 13, Appendix A). Lawyers should always check the applicable state version of the Model Rules.

Hypothetical Three: Who's the Boss?

In 2014, Steven hires Lawyer Jack to represent him in removal proceedings. At the time of hire, Steven is eligible for cancellation of removal (COR) as a non-permanent resident based upon his 15 years continuous presence in the United States and his unusually close relationship with his diabetic mother, a legal permanent resident.

Steven appears at the client's master hearing and files the COR application. The Immigration Court sets the individual hearing date to late 2015.

At the time Steven hired Lawyer Jack, he entered into a fee agreement that was based on one form of relief, Cancellation of Removal. However, the fee agreement expressly provided that if new forms of relief become available or there is a change in the law beneficial or detrimental to the client, Steven would have the right to demand a new fee agreement for the additional legal services.

Several months after Steven retained Lawyer Jack, he suffered injuries as a result of a violent crime. While Steven was recuperating, he fell in love with his nurse Anna, who is a U.S. citizen. Because the client entered with inspection, Anna (who considers herself savvy in immigration matters), tells Steven that she can petition for him to get a "green card" and that he also qualifies for a U-visa as a crime victim, and that he does not have to pay the lawyer one extra dime, because the lawyer will be forced to stay in the Immigration Court case until the end. Steven and Anna marry.

Shortly after the wedding, Steven tells the lawyer about the marriage and directs the lawyer to now represent Anna, too, and to file an I-130 and U- visa application immediately so that Steven will have alternate forms of relief in his removal proceeding. *Steven also tells Lawyer Jack that he will not pay any additional fees but still expects the lawyer to continue representing him*. Anna, who insists on accompanying Steven to all meetings with Lawyer Jack, threatens that she will file a Bar complaint against the lawyer if he does not comply with their demands.

Analysis

Steven Files a Motion to Withdraw in Immigration Court. Is it approvable or has he violated Rule 1.16?

Because this scenario is complex, we will discuss the facts that are relevant to Rule 1.16 one at a time.

First, the procedural posture of Steven's case is that he is in removal proceedings. Because the matter is before a court, Lawyer Jack would have to comply with Rule 1.16(c) if he decides to withdraw. The lawyer would also have to comply with Rule 1.16(d) whether or not the matter was before a tribunal as defined under the rules. Under court rules, and Rule 1.16(d), the lawyer would be required to provide notice of his intent to withdraw.

Second, Lawyer Jack has an enforceable retainer agreement which anticipates the possibility that during the course of the representation the client may become eligible for a different form of relief because of a change in the law or facts. Under the agreement the lawyer may require a superseding retainer agreement which includes additional fees for the new services to be rendered as a condition of going forward. Since here it appears that Steven wants to pursue a different avenue of relief, actually two, he must agree to pay if he wants Lawyer Jack to continue to represent him. His failure to agree to

pay the lawyer to pursue additional and completely different courses of action would be grounds for permissive withdrawal under Rule 1.16(b)(5), particularly when the client is acting in bad faith as it appears here.

Assuming Lawyer Jack moved to withdraw, after warning Steven that he would if he refused to pay the fees (as required under Rule 1.16(b)), the court would likely take into consideration any prejudice to the Steven's case as a result of the withdrawal. Here, because the client's individual hearing is almost two years away, Jack would have sufficient time to retain another lawyer. However, because Steven does not appear to have warned Jack, he has technically violated Rule 1.16(b)(5). As a practical matter, such failure ought not to trigger a disciplinary sanction, since the client may agree to pay the fee or the court may give the client time to pay the fee if the client opposed the motion on that basis. Lawyer Jack should be permitted to withdraw on the basis of the client's failure agree to pay the additional fees, without more.

Third, Steven's factual situation has changed in that he married a U.S. citizen and also was the victim of a crime, either of which present other viable avenues to legal residency. If Lawyer Jack believed that one avenue was better than the other, or that one avenue was not viable at all, he would be at odds with Steven who seems to be insisting that Lawyer Jack follow his instructions. Under MR1.16(b)(4) a lawyer may withdraw if he finds the client's conduct repugnant or he has a fundamental disagreement with the client. Although the scenario does state that the lawyer has a fundamental disagreement about pursuing the new avenues of relief, the lawyer may prefer one over the other. Here, Steven has married a U.S. citizen, and the procedure for pursuing permanent residence is straightforward. The U-visa is much more involved since, among other things, it turns on whether law enforcement is interested in prosecuting the crime and whether they need Steven as a witness. Either way, Steven has not given the lawyer the opportunity to even discuss the pros and cons, as he seems to be relying more on his wife Anna than the lawyer. Steven's demand that Lawyer Jack submit new forms of relief without any discussion of the pros and cons is counter to the way most lawyers approach problem solving. But without more, Rule 1.6(b)(4) would probably not be a basis for withdrawal.

Fourth, Steven is now confronted with a situation where a third party, his wife, wants Lawyer Jack to represent her, and is trying to dictate strategy and other decisions concerning the representation, including telling Steven that he doesn't have to pay any additional fees. Further, Anna is insisting on accompanying her husband to all meetings with the lawyer. To the degree that she is not a client—she was not one for the COR or the U-visa—her attendance at meetings raises confidentiality issues, unless there is some reason why she to needs to accompany her husband, such as translating. Lastly, she is threatening to file a disciplinary complaint to coerce Lawyer Jack to provide the additional legal services free of charge according to a dictated strategy. Lawyer Jack has encountered many difficulties in his relationship with Steven since his wife came along.

Under 1.16(b)(6) the lawyer may withdraw if the representation presents an unreasonable financial burden or is unreasonably difficult. Here, Lawyer Jack could easily argue that both obstacles are present. For the lawyer to have to provide substantial legal services for no fees would amount to an unreasonable financial burden. In addition, the representation has been rendered unreasonably difficult by the new wife's demands: non-payment of fees, mandatory pursuit of alternate strategies, and her insistence on attending lawyer-client meetings where she is not a client. Moreover, a lawyer cannot be compelled to take on a new client; nor can he provide diligent and competent representation under the threat of a disciplinary complaint.

Here, Lawyer Jack has ample grounds under Rule 1.16(b (5) or (6), and a colorable basis under Rule 1.16(b)(4), to withdraw.

Hypothetical Four: All in the Family

Bill, a U.S. citizen, and Maria, a citizen of Mexico, are newly married. They hire Lawyer Joseph to represent them with an application for marriage-based adjustment of Maria's status to permanent residence. Maria entered on a B-2 visa, and she overstayed. Lawyer Joseph and the couple sign an engagement agreement that contains their consent to dual representation. Joseph explains the benefits of dual representation, including the convenience of interacting with only one lawyer and lower legal costs. He explains that they would be waiving the lawyer's duty of confidentiality, which means that any information that they share with the lawyer individually is not confidential as to their spouse. The lawyer further explains that he would have to withdraw from the representation altogether if there is a conflict between them that could not be resolved, but that under certain circumstances one spouse may consent to the lawyer remaining as counsel to the other.

Lawyer Joseph files the one-step I-130 petition and I-485 application. Three weeks after filing, Bill informs Joseph that he believes Maria has been cheating on him, that he is moving out of the house, and that he is withdrawing his support of her application for permanent residence. Maria wants to continue the application. She believes that, with more time, she will be able to repair their relationship and she is worried about being placed in removal proceedings and deported.

Analysis

May Lawyer Joseph continue to represent both Maria and Bill?

Almost certainly no.

Because Bill decided he wants to withdraw his support for the application, his interests are now directly adverse to Maria's. Lawyer Joseph would have a conflict which violates MR 1.7 (current client conflict) because he cannot represent Bill in his attempt to withdraw his support for the application while also representing Maria in pursuing legal residency on the basis of the very same application. As a practical matter, in order to resolve the conflict, Lawyer Joseph would have to obtain Bill's consent to continue to represent Maria. However, even if Bill consented, under Rule 1.7, Lawyer Joseph must "reasonably believe" that he would be able to provide diligent and competent representation to both Bill and Maria. Here, because Bill wants to withdraw his support for the application, it would be impossible for Joseph to represent Maria's interests. Even if Lawyer Joseph somehow had a subjective belief that he could diligently represent both clients, his belief would not be reasonable (based on an objective standard). Under the circumstances, here, continuing to represent both parties would violate MR 1.7 and Joseph would have to withdraw under MR 1.16(a).

It is worth noting that even if for some reason the present conflict were resolvable, *i.e.*, if Bill agreed to continue supporting the application, this case would have great potential for future conflicts. In particular, Bill might try to use the immigration case as a tool to achieve more favorable terms in a divorce settlement. For this reason, the prudent and conscientious lawyer might choose to withdraw under one of the scenarios for permissive withdrawal.

Lawyer Laura from across town calls Lawyer Joseph to request Maria's complete file. May Joseph provide the file?

Yes, after contacting Maria and getting her approval. As a general matter, under MR 1.16(d,) when the lawyer-client relationship is terminated, the lawyer has an obligation to return the file to the client. In a dual representation situation, such as this, both the husband and the wife, as clients, would have a right to the file and the lawyer does not need one party's permission to release the file to the other. Here , it appears that Maria has decided to retain new counsel, but she has not "discharged" Lawyer Joseph. Accordingly, before turning over the file, Lawyer Joseph should contact Maria and confirm that she is terminating the representation and that she authorizes Lawyer Joseph to send the file to the other lawyer directly.

Bill asks Lawyer Joseph to withdraw the I-130. May Joseph comply?

No. As discussed above, Lawyer Joseph was required to withdraw from representing both the husband and the wife because of the conflict between current clients under MR 1.7. If he were now to represent Bill in withdrawing the application, he would be taking an action that is adverse to Maria. Lawyer Joseph would have to decline Bill's request for the same reason he had to withdraw from the dual representation in the first place. Since MR 1.16(d) requires that the lawyer take reasonable steps to protect the client's interest after termination, Lawyer Joseph should recommend that Bill retain other counsel and take reasonable steps to protect Bill's interests, among them, returning the file.

Maria tells Lawyer Joseph that she wants him to continue with her case because Laura wants too much money to represent her. Maria asks Lawyer Joseph to file a U visa for her as a victim of domestic abuse. She tells Joseph that Bill has been physically abusing her and she is obtaining a restraining order. May Joseph represent her with the U Visa?

No. As discussed above, Lawyer Joseph was required to withdraw on the basis that continued representation of current clients whose interests are adverse violate MR 1.7. Maria is now asking Lawyer Joseph to represent her individually in obtaining legal residency on a different basis. In pursuing a U visa, Maria would be arguing that she was the victim of a crime committed by Bill. She would need to file a criminal charge against him. If Lawyer Joseph were to represent Maria in obtaining the U visa, he would be violating the duty of loyalty owed to Bill, as a former client, under MR 1.9. It is very hard to imagine that Bill would, in effect, consent to his former lawyer pursuing a case that requires bringing criminal charges against him. This conflict too appears to be unresolvable and Lawyer Joseph would have to decline representing Maria and recommend that she retain new counsel.

Hypothetical Five: No Good Deed Goes Unpunished

George, the owner of a new marketing firm, hires an immigration lawyer to file an H-1B petition for his wife's nephew Sam, a recent business school graduate from Iran.

The lawyer begins compiling evidence to prove that the new business is a going concern that would be able to support hiring an H-1B employee. This includes reviewing the business plan, available financing, and year-to-date financial statements showing projected annual income of the new firm. George is finding that securing corporate clients is much harder than he anticipated, and his projected revenues are lower than expected. To prove that he is able to pay the required H-1B wage, George exaggerates the firm's year-to-date income. He shares this information with the lawyer.

Analysis

The lawyer decides that he cannot file the petition based on the misinformation regarding the revenue, which would be included in supporting documents for the H-1B petition. How should he proceed?

Here, the lawyer is correct in deciding that he cannot file the H-1B petition which includes supporting documents that he knows contain material misrepresentations, If the lawyer were to assist George in filing a fraudulent H-1B petition, the representation would result in a violation of MR 3.3 (candor to tribunal) and EOIR's comparable candor rule, 8 CFR 1003.102(c).[105] Under MR 3.3, when a lawyer knows that his client intends to or has submitted false information to a tribunal, he is required to do everything reasonably necessary to prevent his client from committing a fraud on the tribunal, even if it means disclosing confidential information.[106] Under the EOIR rule, the lawyer would be required to take "remedial measures" to prevent or remedy a fraud on the tribunal if he has knowledge of the fraud, or recklessly disregards the conduct constituting the fraud.

Under MR 3.3, the lawyer would have to try to persuade George to provide accurate information. Among the various reasons would be the warning that the lawyer would be required to withdraw from the representation under MR 1.16(a) and might even be required to disclose the fraud to the tribunal, even if he withdrew.[107]

Later that day, Sam informs the lawyer that he is also worried about the viability of George's business. He tells the lawyer that he has a job offer with a more established marketing firm in the same area and he asks that the lawyer not tell George. How should the lawyer proceed?

This is a tough but common ethical dilemma in employment based visa or residency matters where the lawyer has accepted the representation, but apparently has not obtained the employer's and employee's express consent to dual representation. This would include a waiver of confidentiality and possibly the circumstances under which the lawyer might either have to withdraw from the matter altogether or withdraw from representing one or the other. Here, the lawyer has obtained information from Sam that George may need to know, *i.e.*, that Sam has another job offer.

Clearly, George is the lawyer's client, since he is the petitioner and the lawyer owes George a duty of loyalty which would include advising George about any information relevant to the representation. Here, George would certainly want to know that Sam intended to take another job offer: George has already started the process, which included retention and payment of legal fees to the lawyer in reliance on Sam's desire to work for George's company. George would also want to know because, presumably, he would have to start looking for another employee.

However, the lawyer has a problem because Sam confided in the lawyer on the basis that the lawyer was representing him as well. This would be a reasonable belief in the absence of any information to the contrary. Sam apparently was concerned that the H-1B might not be granted because George's new company might not be viable for purposes of the H-1B and was implicitly seeking legal advice, in light of the other job offer.

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[105] It might also violate other professional responsibility rules such as MR 4.1 (truthfulness in statements to third parties in connection with representation of client) and MR 8.4(c) (lawyer's dishonesty, fraud, deceit or misrepresentation generally)

[106] Because some state versions of MR 3.3 do not require disclosure of confidential information under these circumstances, lawyers should check their home state's version of MR 3.3.

[107] *See* Ethics Compendium One (MR 3.3) for a comprehensive discussion of candor toward a tribunal and Ethics Compendium Two (MR 1.6) for a comprehensive discussion of the duty of confidentiality.

The lawyer now has a conflict. On one hand, he may need to tell George that Sam is having doubts about the H-1B process and has the option of taking a position with another company. On the other hand, the lawyer is required to keep Sam's information confidential. The conflict could easily be resolved if the lawyer was able to obtain Sam's informed consent to waive confidentiality between him and George. For the consent to be informed, the lawyer would have to advise Sam of any adverse consequences, such as George deciding to withdraw the job offer and discontinuing the H-1B petition altogether. Although not a legal consequence, Sam's consideration of another job offer might also cause family disharmony, *e.g.*, George might complain to his sister that her son was disloyal to George by looking for other employment.

If Sam did not consent, the lawyer would most likely be required to withdraw from representing George and Sam based on a current client conflict. We say "most likely" because an argument could be made that because Sam had not advised the lawyer that he intended to accept another job offer, the lawyer did not have a duty to advise George. In such a situation, the rationale is that as long as the lawyer reminds Sam that the lawyer owes George a duty of loyalty, the lawyer could essentially overlook the conversation this one time with the warning that if Sam were really serious about considering the other position, he would have to retain other counsel.

However, a lawyer who took this approach would be running the risk that a disciplinary authority might conclude that the lawyer crossed the line—by essentially looking away—and therefore violated MR 1.16(a). The prudent and conscientious immigration lawyer considering the alternative of keeping his client, George, in the dark should consider consulting with other colleagues or local ethics counsel.

More importantly, since this is a common scenario, the prudent and conscientious lawyer, should seek assistance in creating a well-written dual representation agreement which anticipates the scenario discussed above and makes abundantly clear the waiver of confidentiality if she is the only lawyer handling the matter for the parties.

Hypothetical Six: Who's the Client?

Mario, an Italian national, retains a lawyer to represent him after a dramatic change in his work situation threatens his legal status in the U.S.. Mario had worked in Italy for a large, established U.S. corporation with global affiliates, and he entered the U.S. on an L-1A multi-national manager visa. In the U.S., he managed part of the corporation's advertising team. Based on Mario's success in this position, the corporation agreed to support his application for permanent residence through an EB-1 multinational manager petition. Through its own outside counsel, the corporation filed the EB-1 petition. After that petition was approved, Mario submitted his I-485 application for permanent residence. The outside counsel considered itself to be the corporation's lawyer, not Mario's. The outside counsel decided the strategy of filing the I-140 petition first, and then for Mario to file his application for adjustment of status to permanent residence based on the I-140 approval. Mario did not retain his own lawyer before filing the I-485 application, relying instead on a corporate intra-net agreement[108] that the outside counsel would handle the matter. Mario was never given a copy of the agreement to sign.

After the I-140 approval, Mario's I-485 was filed on February 1, 2014. On July 1, 2014, because of sharply declining sales of its main product, the corporation gave Mario a 30-day notice of termination of his employment.

[108] The intra-net agreement referred to here does not bear Mario's signature. It is a separate agreement between outside counsel and corporation maintained on the corporation's internal drive.

Mario must find a new job that is the *same or similar* to the one he held with the corporation in order to port successfully under "The American Competitiveness in the Twenty-First Century Act of 2000 (AC21)." He hires his own counsel to know what the job description was under the I-140 petition and to advise Mario what would be *similar*, and to get a copy of the I-140 petition, Mario's lawyer needs the file from the corporation's outside counsel.

The outside counsel initially says that the I-140 file belongs to the corporation. He relies on the internal engagement agreement on the corporate intra-net. In addition, the file contains the corporation's proprietary information. The outside counsel refuses to turn over the I-140 file for these reasons.

Analysis

Does Mario have a right to get his entire I-140 file from the corporation's outside counsel? If not, does he have a right to part of the file?

It depends. If Mario can establish that for all practical purposes, he was a client based on an implied dual representation scenario, he would be entitled to the entire file in the same way as the corporation would be. Here, under MR 1.16(d), the outside counsel must take steps to protect Mario' legal interests upon termination, which in this case includes access to the I-140 petition. Mario will be prejudiced if he cannot prove that he can port to a new job. The course of conduct between Mario and the outside counsel should be sufficient to establish that Mario had reason to believe that the outside counsel was representing his interests and had the same duty of loyalty to him as it did to the corporation. In particular, it would be reasonable for Mario to assume that the outside counsel represented him simply by the assertion that he was "handling the matter" and the fact that the outside counsel made all the strategic decisions affecting Mario and never told Mario to obtain his own counsel.

If Mario were not deemed a client because the intra-net agreement expressly provided that the outside counsel represented only the interests of the corporation, Mario would then have to establish that nothing in the agreement expressly precluded him from at least having access to the I-140/I-485 papers in the file. The I-485 application clearly belongs to Mario.

If it turned out that the intra-net agreement specifically provided that Mario would be denied to access to the file, Mario would have a very good argument that the agreement itself was not enforceable because he never signed it and was not provided with sufficient information to make an informed decision about any possible conflicts that could develop, *e.g.*, that the corporation would deny him access to the file. As discussed above, there is no indication that Mario was advised to have an independent lawyer even look at the agreement before Mario agreed to have the corporation sponsor him. There is no indication in the scenario that Mario was even able to retrieve a copy of the agreement after he was terminated.

Indeed, there is no evidence that Mario could have provided informed consent to an agreement in which he waived his right to the file when the failure to have such access would have a material adverse impact on his legal rights.

As to any proprietary information contained in the documents at issue, whether or not the corporation had maintained confidentiality to the information, there could be no ethical justification for not at least providing redacted copies of the documents at issue.

Here, if the outside counsel rejected all efforts to turn over the requested documents, he would most likely be found to have violated Rule 1.16(d).[109]

The above-scenario makes clear that it is always better for a lawyer handling a case involving an implied dual representation to have the parties sign an engagement agreement that sets for the understanding as to potential conflicts and the rights of the respective parties. At a minimum, if a the employer and its lawyer proceed on the basis that the lawyer is representing the corporation's interests only, the employer's lawyer should advise the employee to retain his own counsel.

Hypothetical Seven: Lawyer for Life? Refusing to Accept Discharge

Lawyer Hannah was engaged by U.S. citizen Violet to prepare an I-130 for her foreign spouse. Their engagement agreement provided that Violet was to pay the fee in installments. Lawyer Hannah prepared the I-130 forms and sent them to Violet to review.

Violet kept the forms but decided to fire Lawyer Hannah. Rather than tell Hannah directly, the client then brought the draft to another lawyer and asked him to finish the matter. Lawyer Hannah did not learn of the client's conduct until the new lawyer called her and requested a copy of the client's file.

Lawyer Hannah refused to provide the file on the basis that she had not been paid pursuant to the agreement. Additionally, Lawyer Hannah insisted that because she had a valid retainer agreement she still represented the client and would only terminate the representation when she was paid.. Lawyer Hannah also accused the new lawyer of interfering with her representation of Violet.

Analysis

Did Lawyer Hannah violate Rule 1.16?

This scenario involves discharge and duties of lawyer thereafter. Since the client fired Lawyer Hannah, Hannah must withdraw under Rule 1.16(a) and also comply with Rules 1.16(c) and (d). Under Rule 1.16(d) she must return papers to which Violet is entitled. Depending on the law in Hannah's state, she may be able to assert a retaining lien.[110] Here, it is a question of fact as to whether the monies paid by the client cover the cost of Lawyer Hannah's work in preparing the draft. Even when a lawyer has a legal right to a retaining lien, that right is balanced against the material adverse effect or prejudice to the client if she is denied access to the file.

In this scenario any prejudice is minimal. The matter is not yet before a tribunal and it is not a situation involving Lawyer Hannah's possession of an original document, like a passport. Here, no papers have been filed and there does not appear to be any deadline that has to be met. Under the facts, it does not appear that Lawyer Hannah violated Rule 1.16(d) by failing to turn over the file. So for that aspect of the scenario the answer would be no violation.

[109] It is worth noting that the Eleventh Circuit has recently held in *Krupati v. USCIS*, 767 F.3d 1185, 1191 (11th Cir. 2014) that foreign nationals can petition for review on a denied I-140 even if it was filed by an employer since the beneficiary of an I-140 visa petition is within the zone of interest of the foreign national. Accordingly, even if it is undisputed that the lawyer is only representing the employer, the lawyer may still be required to turn over the I-140 approval to the employee. The foreign national falls within the statute's zone of interest especially when exercising portability under INA 204(j). Accordingly, if the employee has standing in an I-140 revocation, it would be difficult for the petitioner to argue that it may withhold the I-140 file.

[110] As set forth in MR 1.8(i)(1) a lawyer "may acquire a lien authorized by law to secure the lawyer's fee or expenses." Lawyer's should check their home state's law as to retaining liens.

There are still other issues, however. Lawyer Hannah has to "withdraw" under 1.16(a) based on the discharge. Rule 1.16(c) does not apply because the matter is not before a tribunal. In other words, no motion to withdraw is required. EOIR rules say only that a lawyer must continue unless terminated by client or moves to withdraw. Good practice would be for Lawyer Hannah to send Violet a letter confirming discharge, but making the demand that she pay the fee for services actually rendered. A client has right to terminate the representation, but still must abide by the obligation to pay the lawyer's fee for work done on the client's behalf.

The other issue concerns what further legal services, if any, a lawyer may or must provide after discharge. Under Rule 1.16(d), a lawyer must take steps to protect clients, such as returning files or providing information about the status of case. However, once a lawyer is terminated, she is not authorized to take any substantive actions on the client's behalf and certainly would not be entitled to any fees for services rendered after termination. Sometimes a lawyer may need to assist the new lawyer with the file or bring the new lawyer up to speed as quickly as possible. Where, as here, Lawyer Hannah was discharged, she would be justified in charging the client for these additional services, but would need to reach an agreement with the client before providing the services, Here there is no indication that Violet asked Lawyer Hannah to provide such services. Quite the opposite. A lawyer cannot force a client to continue the representation. Lawyer Hannah's position that she was still Violet's lawyer and her refusal to withdraw after being terminated would violate Rule 1.16(a).

One final note. Lawyer Hannah's accusation that the new lawyer was "interfering" with the existing lawyer-client relationship has no factual basis in the scenario. There is not even a hint that the new lawyer engaged in improper solicitation.[111] If anything, this claim is a manifestation of Lawyer Hannah's distorted interpretation of the agreement she signed with the client.

Hypothetical Eight: Is a Lawyer Required to Accept a Case?

Lawyer Ralph is the only lawyer doing immigration work in a small town 100 miles from the closest other immigration lawyer. He refuses to take any immigration case involving a person who does not speak fluent English or is not currently in status.

Analysis

Does Lawyer E's position violate Rule 1.16?

No. Nothing in Rule 1.16 prohibits a lawyer from declining representation for any lawful reason. As a practical matter, however, Lawyer Ralph is not likely to have a successful immigration practice.

This is not a Rule 1.16(b)(1) situation which says a lawyer can withdraw for any reason unless to do so has a material adverse effect on the client's matter. Since this scenario involves declining representation rather than withdrawing, Rule 1.16(b)(1) would not apply. Because Lawyer Ralph is like the doctor who tells her nurse not to send in any more "sick" patients, it could be argued that because the nearest immigration lawyer is a 100 miles away, Lawyer Ralph's conduct is prejudicial to potential clients who may not be able to travel. But that argument is not even remotely colorable.

[111] Some lawyers resent the fact that another lawyer will copy a draft application found in the client's file or that the client will use the draft to proceed pro se. However, since the client has a presumptive right to the entire file there would be no ethical or legal justification to withhold it.

Hypothetical Nine: Duty to Investigate

Lawyer Joan has represented members of client's family in many different areas of immigration law. During the representation of one particular member of the family for an H-1B visa, Lawyer Joan discovers that the client has presented her with what looks like an altered college transcript. Joan calls an AILA ethics mentor for advice about whether she needs to withdraw according to Rule 1.16.

Analysis

What should be the AILA ethics mentor's advise?

This scenario covers the obligations of a lawyer when faced with a client's fraudulent or criminal conduct related to the representation. What action the lawyer takes is dependent on whether the lawyer knows or only reasonably believes there is a fraud or crime. If lawyer knows or "should know," as this is the interpretation we have given to Rule 1.16(a) that the representation will result in a violation of a rule or law, the lawyer would have to withdraw. If the client's conduct would be a fraud on a tribunal, under Rule 3.3 the lawyer also might have to take additional steps beyond withdrawal that may include disclosure of confidential information. But the facts here do not establish a basis for knowledge.

However, because what looks like an altered transcript could be deemed a red flag, Lawyer Joan should conduct some investigation to verify the authenticity of the document. The failure to do so could be deemed "conscious avoidance" of the fraud. By undertaking some investigation, the lawyer may protect herself from being accused of any number of disciplinary violations. An investigation also protects the client since immigration authorities would also be interested in the authenticity of any material evidence. The lawyer could ask the client to provide corroborative evidence. And, of course, the lawyer could tell the client she suspects that the transcript is fraudulent and that unless she is convinced otherwise, under Rule 1.16(b)(2) or (3), she is permitted to withdraw. Lawyer Joan could tell the client that if she came to know of the fraud later on in the representation, she could be obligated to disclose confidential information to prevent a fraud on the court. Lawyer Joan could also try to further dissuade the client from attempting a fraud by pointing out that the client's family and friends, with whom the lawyer has had a long-standing relationship, would be curious as to why the lawyer withdrew. The client may fear being asked to explain.

So bottom line—Lawyer Joan should undertake investigation to verify the transcript or persuade the client to submit a corrected version. Unless she comes to know that the transcript is fraudulent, Lawyer Joan would have the option under 1.16(b)(2) or (3) to withdraw, but she doesn't have to. As long as withdrawal is based on reasonable belief of fraud—rather than knowledge—the lawyer would not be required to withdraw or disclose confidential information. If Lawyer Joan exercised the option to withdraw, she could advise USCIS that "professional considerations" are the reason, as is recommended in the comments to Rule 1.16.

E. Summary of State Rule Variations

ABA Model Rule 1.16 covers termination of representation. The rule has four parts: (a) mandatory termination of representation, (b) permissive termination of representation, (c) notice to the tribunal, and (d) steps to protect the client's interests and the return of client documents upon termination.

MR 1.16(a) provides the circumstances under which a lawyer *shall not*, as an initial matter, represent a client or, where representation has commenced, *shall* withdraw from representation. These circumstances are: (1) if the representation will result in an ethical or legal violation, (2) if the lawyer's physical or

mental condition "materially impairs" the lawyer's ability to undertake or continue the representation, or (3) if the lawyer is discharged.

MR 1.16(b) describes when a lawyer *may* withdraw from representation, so long as withdrawal does not run afoul of section (c) (described in more detail below). Notably, this is a non-exhaustive list. A lawyer may withdraw from representation if: (1) withdrawal can be accomplished without materially and adversely affecting the client's interests, (2) the client persists with a legal course of action that the lawyer "reasonably believes" is criminal or fraudulent, (3) the client has used the lawyer's services to commit a crime or fraud, (4) the client insists upon taking action that the lawyer considers repugnant or fundamentally disagrees with, (5) the client fails substantially to fulfill an obligation to the lawyer regarding legal services despite reasonable warning that the lawyer will withdraw unless the obligation is fulfilled, or (6) the representation will cause an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

MR 1.16(c) requires a lawyer to comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. Moreover, if the lawyer is ordered to do so by a tribunal, he or she must continue representing a client notwithstanding good cause for terminating the representation.

Finally, MR 1.16(d) provides that, upon termination of representation, a lawyer must take steps "to the extent reasonably practicable" to protect the client's interests. These steps include giving reasonable notice to the client of termination, allowing time for the client to find other counsel, returning papers and property to which the client is entitled, and refunding any fee or expense paid by the client that has not been earned or incurred by the lawyer. Section (d) further provides that a lawyer may retain papers relating to the client as permitted by other law.

Summary of Key Variations

Each state and the District of Columbia has a rule that covers declining or terminating representation in its respective ethical rules. Of the 50 states and the District of Columbia, only California has not adopted a version of MR 1.16,[112] 19 have adopted MR 1.16 verbatim,[113] and 31, including the District of Columbia, have versions of MR 1.16 which differ.[114]

Variations Resulting from State Revisions to the Model Rule

Most states structure their rules regarding termination of representation in the same way that MR 1.16 is structured: circumstances under which a lawyer *must* withdraw, circumstances under which a lawyer *may* withdraw, notice and compliance with court rules, and the requirement that the lawyer take certain steps to protect the client's interests upon termination of representation. However, several states have made revisions to their respective rules.

Some state rules, for example, vary with respect to the circumstances under which a lawyer *must* withdraw from representation by moving circumstances found in MR 1.16's permissive withdrawal section to the state's mandatory withdrawal section.

[112] California uses a completely different rule format.

[113] These states are Alaska, Arkansas, Colorado, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Nebraska, Nevada, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Vermont, Wisconsin, and Wyoming.

[114] These jurisdictions are Alabama, Arizona, Connecticut, Delaware, Florida, Hawaii, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, and the District of Columbia.

Many state rules vary with respect to permissive withdrawal by listing additional specific circumstances under which a lawyer *may* withdraw and others vary by removing circumstances where withdrawal is permitted. However, those differences—whether the state adds or removes circumstances—are not crucial because all state termination of representation rules contain a catch-all circumstance permitting withdrawal from representation if "other good cause for withdrawal exists."

Several states also reword the requirement of notice to or permission from a tribunal when terminating representation in their respective termination of representation rules.[115] For example, New York's version provides that a lawyer may not withdraw from a matter before a tribunal without its permission if permission is required by that tribunal's rules.[116] Georgia provides that "[w]hen a lawyer withdraws it shall be done in compliance with applicable laws and rules."[117]

There are also state variations from MR 1.16(d) as to the lawyer's obligation to return papers and property upon termination.[118] For example, Massachusetts and Minnesota add detailed examples of the types of client documents which may or should be returned to clients upon termination. Other states, such as Ohio, expressly list the types of documents that constitute client papers and property. The Model Rule does not expressly identify or describe the types of papers or property to which the client may be entitled. With respect to MR 1.16(d)'s reference to return of fees and expenses, many states' rules do not mention expenses.[119] Lastly, the termination of representation rules for Georgia, Hawaii, and New York, unlike MR 1.16(d), are silent as to whether a lawyer may retain client documents "to the extent permitted by other law" or "to the extent permitted by law." The termination of representation rules for the District of Columbia, Maine, and North Dakota, permit the retention of client documents only to the extent permitted by more state-specific law or rules referenced in their respective Section (d), and not to the extent permitted by "other law" or the law generally.

Variations Resulting from Updates to the Model Rule

Some differences between the Model Rule and state rules arose when the ABA updated the Model Rules and states did not do so.[120] For example, MR 1.16 was amended in 2000[121] to include the return of non-incurred expenses as well as unearned fees, but many states' rules do not mention expenses.[122] In addition, several states rules retain the language of the previous version of MR 1.16(b)(4). MR1.16(b)(4) now provides that a lawyer may withdraw if "the client insists upon taking action that the lawyer

[115] These states include Georgia, Massachusetts, Mississippi, New York, Virginia and Ohio.

[116] "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission." NY Rule 1.16(d).

[117] "When a lawyer withdraws it shall be done in compliance with applicable laws and rules. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." GA Rule 1.16(c).

[118] The following states' termination of representation rules vary substantively from MR 1.16(d) with respect to the return of documents: Massachusetts, Minnesota, Montana, Ohio, Utah, and Virginia.

[119] MR 1.16 was amended in 2000 to include the return of non-incurred expenses as well as unearned fees, The state versions of Rule 1.16 that do not mention return of non-incurred expenses are: Alabama, Arizona, Connecticut, Georgia, Kansas, Michigan, Mississippi, Texas, Virginia, and West Virginia.

[120] These include stylistic changes, which are not discussed in detail here. For example, the pre-2000 MR 1.16 combined what is now section (b) with subsection (b)(1). *See* Ethics 2000 Commission, Rule 1.16, *available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule116.html* (showing a redline of the 2000 amendments to MR 1.16). Several jurisdictions, including Alabama, District of Columbia, Georgia, Kansas, Massachusetts, Michigan, Mississippi, Virginia, and West Virginia, have retained this style.

[121] *See* Ethics 2000 Commission, Rule 1.16, *available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule116.html* (showing a redline of the 2000 amendments to MR 1.16).

[122] These states include Alabama, Arizona, Connecticut, Georgia, Kansas, Michigan, Mississippi, Texas, Virginia, and West Virginia.

considers repugnant or with which the lawyer has a fundamental disagreement." Several states[123] have also retained the previous wording of MR 1.16(b)(4), which provided that a lawyer may terminate a representation if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent."[124] Finally, a number of state rules do not specifically address the requirement that a lawyer comply with applicable rules when withdrawing, including notice to or permission of a tribunal when terminating representation, but do include MR 1.16(c)'s statement that a lawyer must abide by a tribunal's order to continue the representation.[125,126] The omission that a lawyer must comply with applicable rules when withdrawing should not be interpreted as a justification for a lawyer's failure to comply with the applicable rules when appearing before a tribunal, however. The particular variations described in this paragraph will not be covered in detail in the summaries below.

Summary of State Variations

Different jurisdictions have implemented rules concerning termination and withdrawal of representation in myriad ways. This section focuses on revisions to the Model Rule made by specific states. Generally, we do not discuss state rule variations that are due to a particular state's retention of language from prior versions of MR 1.16.[127]

Arizona

Arizona's Rule 1.16 retains some language from a previous version of MR 1.16 and includes an additional requirement. AZ Rule 1.16(d) affirmatively requires a lawyer to provide his or her client with all of the client's documents and any documents reflecting work performed for the client. The rule also allows a lawyer to retain documents reflecting work performed for the client "only if retaining them would not prejudice the client's rights."[128]

California

California's rule regarding termination of representation, Rule 3-700[129] Termination of Employment, is not based on MR 1.16, but is nonetheless structured similarly to MR 1.16. CA Rule 3-700(A), like parts of MR 1.16(c) and (d), prohibits a lawyer from withdrawing from employment in a proceeding before a tribunal without the tribunal's permission, if the tribunal's rules so require, and not until the lawyer takes reasonable steps to avoid reasonably foreseeable prejudice to the client and complies with applicable laws and rules.[130] CA Rule 3-700(B) requires a lawyer to withdraw from employment with

[123] These states include Alabama, Georgia, Kansas, Massachusetts, Michigan, Mississippi, Virginia, and West Virginia.

[124] *See* Ethics 2000 Commission, Rule 1.16, *available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule116.html* (showing a redline of the 2000 amendments to MR 1.16).

[125] These states include Alabama, Kansas, Michigan, Mississippi, North Dakota, Texas, and West Virginia.

[126] MR 1.16's requirement that a lawyer comply with applicable rules requiring notice to or permission of a tribunal when terminating representation was added in 2000. *See* Ethics 2000 Commission, Rule 1.16, *available at http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule116.html* (showing a redline of the 2000 amendments to MR 1.16).

[127] The changes themselves, however, may be still be substantive, so you should review your respective state's termination of representation rules for guidance. For example, Alabama, Mississippi, and West Virginia retain language from previous versions of MR 1.16, as summarized above, but contain no other changes to their rules. Thus, these differences will not be discussed in this section.

[128] "Upon a client's request, the lawyer shall provide the client with all of the client's documents, and all documents reflecting work performed for the client. The lawyer may retain documents reflecting work performed for the client to the extent permitted by other law only if retaining them would not prejudice the client's rights." AZ Rule 1.16(d).

[129] California does not use the Model Rule format.

[130] "In General,(1) If permission for termination of employment is required by the rules of a tribunal, a member shall not withdraw from employment in a proceeding before that tribunal without its permission. (2) A member shall not withdraw from employment until the

the permission of the tribunal if required by its rules. Additionally, withdrawal is mandated if the lawyer is not representing a client before a tribunal but (1) knows or should know that the client is bringing or continuing an action without probable cause and for the purpose of harassing and maliciously injuring another person, (2) knows or should know that continued employment will result in an ethical violation, or (3) the lawyer's mental or physical condition renders it unreasonably difficult for the lawyer to carry out the employment.[131] CA Rule 3-700(C) lays out the situations under which a lawyer may withdraw, including situations in which the client insists on a position not warranted under existing law and that cannot be supported by a good faith argument, seeks to pursue an illegal course of conduct, or breaches an agreement or obligation to a lawyer as to expenses or fees, among other things.[132] The lawyer *may* also withdraw if (1) the continued employment is *likely* to result in a violation of ethical rules, (2) the inability to work with co-counsel indicates that the best interests of the client will be served by withdrawal, (3) the lawyer's mental or physical condition make it difficult for her to carry out representation effectively, (4) the client knowingly and freely consents, or (5) the lawyer believes in good faith that the tribunal will find other good cause for withdrawal.[133] Finally, CA Rule 3-700(D) provides that a lawyer who is terminated must, subject to any protective order or nondisclosure agreement, return the client's papers and property promptly at the request of the client. Papers and property include correspondence and pleadings, as well as other items reasonably necessary for the client's representation, regardless of whether the client paid for them or not.[134] Further, a lawyer must promptly refund any part of an unearned advance fee, except for a retainer fee paid solely for the purpose of ensuring the availability of the lawyer.[135]

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member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client, including giving due notice to the client, allowing time for employment of other counsel, complying with rule 3-700(D), and complying with applicable laws and rules." CA Rule 3-700(A).

[131] "A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if: (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (2) The member knows or should know that continued employment will result in violation of these rules or of the State Bar Act; or (3) The member's mental or physical condition renders it unreasonably difficult to carry out the employment effectively." CA Rule 3-700(B).

[132] "If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because: (1) The client (a) insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law, or (b) seeks to pursue an illegal course of conduct, or (c) insists that the member pursue a course of conduct that is illegal or that is prohibited under these rules or the State Bar Act, or (d) by other conduct renders it unreasonably difficult for the member to carry out the employment effectively, or (e) insists, in a matter not pending before a tribunal, that the member engage in conduct that is contrary to the judgment and advice of the member but not prohibited under these rules or the State Bar Act, or (f) breaches an agreement or obligation to the member as to expenses or fees." CA Rule 3-700(C).

[133] "If rule 3-700(B) is not applicable, a member may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because . . . (2) The continued employment is likely to result in a violation of these rules or of the State Bar Act; or (3) The inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal; or (4) The member's mental or physical condition renders it difficult for the member to carry out the employment effectively; or (5) The client knowingly and freely assents to termination of the employment; or (6) The member believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal." CA Rule 3-700 (C).

[134] "A member whose employment has terminated shall . . . [s]ubject to any protective order or non-disclosure agreement, promptly release to the client, at the request of the client, all the client papers and property. 'Client papers and property' includes correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert's reports, and other items reasonably necessary to the client's representation, whether the client has paid for them or not . . . ." CA Rule 3-770(D)(1).

[135] "A member whose employment has terminated shall . . . [p]romptly refund any part of a fee paid in advance that has not been earned. This provision is not applicable to a true retainer fee which is paid solely for the purpose of ensuring the availability of the member for the matter." CA Rule 3-770(D)(2).

Connecticut

Connecticut's Rule 1.16 reflects a difference in its section (d) but is otherwise identical to MR 1.16. Connecticut retains language from a previous version of MR 1.16(d) (*i.e.*, not requiring return of non-incurred expenses) and adds a requirement that a lawyer confirm termination of representation in writing within a reasonable time following termination.[136]

Delaware

Delaware makes no changes to the text of its Rule 1.16, but adds an interpretive guideline on residential real estate transactions, which covers engagement of a lawyer by a buyer or a mortgagor of residential property.

District of Columbia

The District of Columbia's termination of representation rule, unlike MR 1.16, does not provide that a lawyer may withdraw from representation if a client insists upon taking action that the lawyer considers repugnant or with which he has a fundamental disagreement. Still, DC Rule 1.16 contains a catch-all provision for permissive withdrawal: a lawyer may withdraw if he or she "believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of good cause for withdrawal."[137] Further, DC Rule 1.16(b)(4), unlike corresponding MR 1.16(b)(6), does not provide that a lawyer *may* withdraw from representation if representation has been rendered unreasonably difficult by the client. Instead, DC Rule 1.16(b)(4) permits a lawyer to withdraw from representation only if representation has been rendered unreasonably difficult as a result of the client's "obdurate or vexatious conduct."[138] Finally, DC Rule 1.16(d) is worded differently than MR 1.16(d), requiring that a lawyer take *timely* steps to protect the client's interests in connection with any termination, and permitting a lawyer to retain papers relating to the client to the extent permitted by DC Rule 8.1(i), as opposed to "other law" under MR 1.16(d).[139]

Florida

Florida's termination of representation rule, Rule 4-1.16, adds circumstances under which withdrawal is required: a lawyer is *prohibited* from accepting representation or continuing a representation if a client persists in a course of action that the lawyer "reasonably believes" is criminal or fraudulent,[140] or if a client has used the lawyer's services to commit a crime or fraud,[141] unless the client agrees to rectify the crime or fraud.[142]

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[136] "If representation of the client is terminated either by the lawyer withdrawing from representation or by the client discharging the lawyer, the lawyer shall confirm the termination in writing to the client before or within a reasonable time after the termination of the representation." CT Rule 1.16(d).

[137] ". . . a lawyer may withdraw from representing a client if . . . [t]he lawyer believes in good faith, in a proceeding before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

[138] ". . . a lawyer may withdraw from representing a client if . . . obdurate or vexatious conduct on the part of the client has rendered the representation unreasonably difficult . . ." DC Rule 1.16(b)(4)

[139] "In connection with any termination of representation, a lawyer shall take timely steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by Rule 1.8(i)." DC Rule 1.16(d).

[140] ". . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . .the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or fraud . . . " FL Rule 4-1.16(a)(4).

Georgia

Sections (b) and (d) of Georgia's termination of representation rule retain language from previous versions of MR 1.16(b). In addition, like MR 1.16(c), Georgia requires that a lawyer comply with applicable laws and rules when withdrawing from representation, though Georgia does not use the same language as the Model Rule.[143] GA Rule 1.16(d) does not explicitly provide that a lawyer may retain client documents.[144] Finally, Georgia, unlike MR 1.16, provides that public reprimand is the maximum penalty for a violation of GA Rule 1.16.[145]

Hawaii

Hawaii's rule regarding termination of representation is almost identical to MR 1.16, except that it does not explicitly provide that a lawyer may retain client documents.[146]

Kansas

Kansas' rule regarding termination of representation *requires* that a lawyer withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent,[147] while the Model Rule instead provides that a lawyer *may* withdraw from representation in that situation.[148]

Louisiana

Louisiana's Rule 1.16 is almost identical to MR 1.16, except for section (d). While MR 1.16(d) simply provides that a lawyer may retain papers relating to the client to the extent permitted by law, LA Rule 1.16(d) requires that a lawyer, upon written request, promptly release to the client or the client's new lawyer the entire file relating to the matter.[149] Further, a lawyer cannot condition the release of the file on issues of copying *or for any other reason*.[150] Instead, the responsibility of the cost of copying is to be determined at an appropriate proceeding.[151]

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[141] ". . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud." FL Rule 4-1.16(a)(5).

[142] In contrast, MR 1.16 provides that a lawyer may withdraw from representation under these circumstances. MR 1.16(b)(1) and (2).

[143] "When a lawyer withdraws it shall be done in compliance with applicable laws and rules." GA Rule 1.16.

[144] "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . refunding any advance payment of fee that has not been earned." GA Rule 1.16(d).

[145] "The maximum penalty for a violation of this Rule is a public reprimand." GA Rule 1.16.

[146] "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." HI Rule 1.16.

[147] ". . . a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent." KS Rule 226-1.16(a)(4).

[148] KS Rule 226-1.16 also retains language from previous versions of the Model Rule, discussed in Section II.a, above.

[149] "Upon written request by the client, the lawyer shall promptly release to the client or the client's new lawyer the entire file relating to the matter. The lawyer may retain a copy of the file but shall not condition release over issues relating to the expense of copying the file or for any other reason. The responsibility for the cost of copying shall be determined in an appropriate proceeding." LA Rule 1.16(d).

[150] *Id.* (emphasis added).

[151] *Id.*

Maine

Maine's rule regarding termination of representation requires that a lawyer comply with applicable rules (as well as applicable law) when terminating representation.[152] Unlike MR 1.16(c), ME Rule 1.16(c) provides that this section, covering notice to or permission from a tribunal before withdrawal, does not apply to automatic withdrawal for limited representation matters under Rule 1.12.[153] In listing examples of steps a lawyer must take upon termination of representation, ME 1.16(d) requires that a lawyer comply with MR 1.15(f), which concerns the information and data to which the client is entitled.[154] Although MR 1.16(d) does not include this specific language, the last sentence of the section covers this issue, allowing a lawyer to retain papers relating to the client "to the extent permitted by other law."[155]

Maryland

Maryland's Rule 1.16 is almost identical to MR 1.16, except for slight differences found in subsection (b)(4). MD Rule 1.16(b)(4) provides that a lawyer *may* withdraw from representation if the client insists upon action *or* inaction that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement, while MR 1.16(b)(4) makes no mention of inaction.[156]

Massachusetts

Massachusetts' rule regarding termination of representation covers the return of client files in much more detail than MR 1.16, and retains some language from previous versions of the Model Rule. Massachusetts requires that a lawyer make available to a client within a reasonable time all client documents, all papers filed with the court, and all investigatory or discovery documents for which the client paid.[157] Whether the client or the lawyer takes on the cost of making these documents available depends on the type of document. A client is entitled only to a portion of the lawyer's work product, as defined by the Rule,[158] for which the client has paid, so long as there is no contingent fee agreement,[159] and the lawyer must provide copies of the lawyer's work product if the parties have entered into a

[152] "A lawyer must comply with applicable law and rules requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." ME Rule 1.16(c).

[153] "This subsection (c) does not apply to the automatic withdrawal of a lawyer upon completion of a limited representation made pursuant to Rule 1.2." ME Rule 1.16(c).

[154] "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, including . . . complying with Rule 1.15(f) concerning the information and data to which the client is entitled." ME Rule 1.16(d).

[155] "The lawyer may retain papers relating to the client to the extent permitted by other law." MR 1.16(d).

[156] ". . . a lawyer may withdraw from representing a client if . . . the client insists upon action or inaction that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement . . . ." MD Rule 1.16(b)(4).

[157] "A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following: (1) all papers, documents, and other materials the client supplied to the lawyer. The lawyer may at his or her own expense retain copies of any such materials. (2) all pleadings and other papers filed with or by the court or served by or upon any party. The client may be required to pay any copying charge consistent with the lawyer's actual cost for these materials, unless the client has already paid for such materials. (3) all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials." MA Rule 1.16(e)(1)-(3).

[158] "[F]or purposes of this paragraph (e), work product shall consist of documents and tangible things prepared in the course of the representation of the client by the lawyer or at the lawyer's direction by his or her employee, agent, or consultant, and not described in paragraphs (2) or (3) above. Examples of work product include without limitation legal research, records of witness interviews, reports of negotiations, and correspondence." MA Rule 1.16(e)(6)

[159] "[I]f the lawyer and the client have not entered into a contingent fee agreement, the client is entitled only to that portion of the lawyer's work product (as defined in subparagraph (6) below) for which the client has paid." MA Rule 1.16(e)(4).

contingent fee agreement.[160] Notably, the Massachusetts rule prohibits a lawyer from refusing to make client materials available due to nonpayment when retention of those materials would unfairly prejudice the client.[161] In addition, Massachusetts also changes the language requiring notice to or permission from the tribunal, but its requirement is not substantively different than the Model Rule.[162] Unlike MR 1.16, however, MA Rule 1.16(c) does not affirmatively require that a lawyer comply with a tribunal's order to continue representation.[163]

Michigan

Michigan's rule for terminating representation retains language from previous versions of MR 1.16 and requires that a lawyer take "reasonable steps" to protect a client's interests upon termination,[164] as opposed to taking steps "to the extent reasonably practicable" under MR 1.16(d).

Minnesota

Minnesota's rule for termination of representation is the same as MR 1.16, but modifies sections regarding the return of client papers. As an initial matter, MN Rule 1.16(e) provides that a client is entitled to certain papers and property. This includes the papers and property provided to the lawyer by the client and papers and property for which the client has paid.[165] In pending claims and litigation representations, this includes documents such as pleadings, motions, and discovery, regardless of whether the client has paid the lawyer for drafting and serving these documents (but does not include such documents which have not been served or filed if the client has not paid for the drafting of those documents), as well as all items for which the lawyer agreed to advance costs or expenses, regardless of whether the client reimbursed the lawyer.[166] In other types of representations, client files, papers and property does not include drafted but unexecuted documents which do not otherwise have legal effect where the client has not paid the lawyer.[167] MN Rule 1.16(f) provides that a lawyer may charge the client for the reasonable costs of duplicating or retrieving the client's papers only if the client, prior to

[160] "[I]f the lawyer and the client have entered into a contingent fee agreement, the lawyer must provide copies of the lawyer's work product (as defined in subparagraph (6) below). The client may be required to pay any copying charge consistent with the lawyer's actual cost for the copying of these materials." MA Rule 1.16(e)(5).

[161] "[N]otwithstanding anything in this paragraph (e) to the contrary, a lawyer may not refuse, on grounds of nonpayment, to make available materials in the client's file when retention would prejudice the client unfairly." MA Rule 1.16(e)(7).

[162] "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission."

[163] *Id.*

[164] "Upon termination of representation, a lawyer shall take reasonable steps to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by law." MI Rule 1.16(d).

[165] "Papers and property to which the client is entitled include the following, whether stored electronically or otherwise . . . in all representations, the papers and property delivered to the lawyer by or on behalf of the client and the papers and property for which the client has paid the lawyer's fees and reimbursed the lawyer's costs." MN Rule 1.16(e)(1).

[166] "Papers and property to which the client is entitled include the following, whether stored electronically or otherwise . . . in pending claims or litigation representations: (i) all pleadings, motions, discovery, memoranda, correspondence and other litigation materials which have been drafted and served or filed, regardless of whether the client has paid the lawyer for drafting and serving the document(s), but shall not include pleadings, discovery, motion papers, memoranda and correspondence which have been drafted, but not served or filed, if the client has not paid the lawyer's fee for drafting or creating the documents; and (ii) all items for which the lawyer has agreed to advance costs and expenses regardless of whether the client has reimbursed the lawyer for the costs and expenses, including depositions, expert opinions and statements, business records, witness statements, and other materials that may have evidentiary value . . . ." MN Rule 1.16(e)(2).

[167] "Papers and property to which the client is entitled include the following, whether stored electronically or otherwise . . . in nonlitigation or transactional representations, client files, papers, and property shall not include drafted but unexecuted estate plans, title opinions, articles of incorporation, contracts, partnership agreements, or any other unexecuted document which does not otherwise have legal effect, where the client has not paid the lawyer's fee for drafting the document(s)." MN Rule 1.16(e)(3).

termination, agreed in writing to such a charge.[168] Finally, MN Rule 1.16(g) prohibits a lawyer from conditioning the return of client papers and property on the payment of fees or the copying costs.[169]

Montana

Montana's rule for terminating representation is the same as MR 1.16, but makes changes to section (d). Unlike MR 1.16(d), which provides that a lawyer may retain papers relating to the client to the extent permitted by law, MT Rule 1.16(d) provides that a lawyer may maintain and is not obliged to deliver to a client papers relating to the client as required by the limitations on the retaining lien in Rule 1.18(i).[170] MT Rule 1.16(d) requires that a lawyer deliver either originals or copies of all other papers requested or required by a client, and bear the copying costs involved.[171]

New Hampshire

New Hampshire's Rule 1.16 adds section (e), which provides that a lawyer providing limited representation under NH Rule 1.2(f)(1) must terminate the representation upon completion of the agreed representation without leave of the court, but must provide notice of the completed representation to the court.[172]

New York

New York's rule for termination of representation is based on MR 1.16, but makes substantive and structural changes to its rule. NY Rule 1.16(a) prohibits a lawyer from accepting employment on behalf of a person if the lawyer *knows*, or *reasonably should know*, that such a person wishes to engage the lawyer merely for the purpose of harassing or maliciously injuring someone or wishes to present a claim or defense not warranted under existing law.[173] New York requires that a lawyer withdraw from representation under the same circumstances required by MR 1.16(a),[174] except that New York adds a knowledge requirement (*i.e.*, the lawyer must withdraw when he or she "knows or reasonably should know" of these circumstances).[175] New York adds several circumstances under which a lawyer is

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[168] "A lawyer may charge a client for the reasonable costs of duplicating or retrieving the client's papers and property after termination of the representation only if the client has, prior to termination of the lawyer's services, agreed in writing to such a charge." MN Rule 1.16(f).

[169] "A lawyer shall not condition the return of client papers and property on payment of the lawyer's fee or the cost of copying the files or papers." MN Rule 1.16(g).

[170] "A lawyer is entitled to retain and is not obliged to deliver to a client or former client papers or materials personal to the lawyer or created or intended for internal use by the lawyer except as required by the limitations on the retaining lien in Rule 1.8(i). Except for those client papers which a lawyer may properly retain under the preceding sentence, a lawyer shall deliver either the originals or copies of papers or materials requested or required by a client or former client and bear the copying costs involved." MT Rule 1.16(d).

[171] *Id.*

[172] "The representation of a lawyer having entered a limited appearance as authorized by the tribunal under a limited representation agreement under Rule 1.2(f)(1), shall terminate upon completion of the agreed representation, without the necessity of leave of court, upon providing notice of completion of the limited representation to the court." NH Rule 1.16(e).

[173] "A lawyer shall not accept employment on behalf of a person if the lawyer knows or reasonably should know that such person wishes to: (1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person; or (2) present a claim or defense in a matter that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of existing law." NY Rule 1.16(a).

[174] MR 1.16(a) requires that a lawyer withdraw from representation if: "(1) the representation will result in violation of the rules of professional conduct or other law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or (3) the lawyer is discharged."

[175] "Except as stated in paragraph (d), a lawyer shall withdraw from the representation of a client when: (1) the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; or (4) the lawyer knows or reasonably should know that the client is bringing the legal action, conducting the defense, or asserting a position in the matter, or is otherwise having steps taken, merely for the purpose of harassing or maliciously injuring any person." NY Rule 1.16(b).

permitted to withdraw, not explicitly found in MR 1.16(b), including when the client deliberately disregards an agreement or obligation to the lawyer as to expenses and fees, and when the client knowingly and freely assents to the termination.[176] Unlike MR 1.16(b)(7), which permits a lawyer to terminate representation if "other good cause for withdrawal exists," NY Rule 1.16(c)(12) adds a knowledge requirement to its catch-all provision, permitting a lawyer to withdraw if she "believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of good cause for withdrawal. . . ."[177] With respect to notice to or permission from a tribunal, New York uses language different from MR 1.16(c), but imposes the same requirement of giving notice to or receiving permission from a tribunal, when applicable, pursuant to the tribunal's rules.[178] Upon termination, NY Rule 1.16(e) requires that a lawyer take steps to avoid *foreseeable* prejudice to the rights of the client, while corresponding MR 1.16(d) requires that the lawyer take steps "to the extent reasonably practicable to protect the client's interests." Finally, unlike MR 1.16(d), the text of NY Rule 1.16 does not mention that a lawyer may retain the client's file to the extent permitted by law, but Comment 9 to the Rule provides that a lawyer may retain client papers as security for a fee only to the extent permitted by law.[179]

North Carolina

In addition to permissive withdrawal circumstances found in MR 1.16(b), North Carolina's rule for termination of representation provides that a lawyer may withdraw from representing a client if the client knowingly and freely consents to the termination of representation[180] or if the client insists upon presenting a claim or defense not warranted under the law.[181]

North Dakota

North Dakota Rule 1.16 makes several changes and additions not found in MR 1.16, in addition to retaining language from previous versions of MR 1.16. First, ND Rule 1.16 provides that a lawyer *shall*

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[176] "Except as stated in paragraph (d), a lawyer may withdraw from representing a client when: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; (3) the client has used the lawyer's services to perpetrate a crime or fraud; (4) the client insists upon taking action with which the lawyer has a fundamental disagreement; (5) the client deliberately disregards an agreement or obligation to the lawyer as to expenses or fees; (6) the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law; (7) the client fails to cooperate in the representation or otherwise renders the representation unreasonably difficult for the lawyer to carry out employment effectively; (8) the lawyer's inability to work with co-counsel indicates that the best interest of the client likely will be served by withdrawal; (9) the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively; (10) the client knowingly and freely assents to termination of the employment; (11) withdrawal is permitted under Rule 1.13(c) or other law;

(12) the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal; or (13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules." NY Rule 1.16(c).

[177] ". . . a lawyer may withdraw from representing a client when . . . the lawyer believes in good faith, in a matter pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal . . . ." NY Rule 1.16(c)(12).

[178] "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a matter before that tribunal without its permission. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." NY Rule 1.16(d).

[179] "Even if the lawyer has been unfairly discharged by the client, under paragraph (e) a lawyer must take all reasonable steps to mitigate the consequences to the client. The lawyer may retain papers as security for a fee only to the extent permitted by law. *See* Rule 1.15." Comment 9 to NY Rule 1.16.

[180] ". . . a lawyer may withdraw from representing a client if . . . the client knowingly and freely assents to the termination of the representation . . . ." NC Rule 1.16(b)(2).

[181] ". . . a lawyer may withdraw from representing a client if . . . the client insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law . . . ." NC Rule 1.16(b)(8).

seek to withdraw from representation of a client under certain circumstances,[182] while MR 1.16 provides that a lawyer *shall withdraw* from representation under certain circumstances. Thus, ND Rule 1.16 acknowledges that a lawyer may not always be able to withdraw from a representation. ND Rule 1.16's mandatory withdrawal section further provides that a lawyer who *reasonably believes* that representation will result in a violation of the Rule or other law *shall not* represent a client, or *shall seek* to withdraw from representation of the client.[183] Further, and unlike MR 1.16(a), the lawyer must withdraw if he or she has offered material evidence in the testimony of the client, has come to know of the falsity of the testimony, and the client has refused to consent to the disclosure of the falsity of the material to the tribunal.[184] If the tribunal does not permit withdrawal, then the lawyer may continue to represent the client without disclosing the client's false testimony and without violating the North Dakota Rules of Professional Conduct.[185] Finally, ND Rule 1.16 provides that a lawyer may retain papers relating to the client only to the extent permitted by ND Rule 1.19, as opposed to the extent permitted by "other law" as provided in corresponding MR 1.16(d).[186]

Ohio

Ohio's termination of representation rule contains some substantive differences from MR 1.16, in addition to structural changes. For example, Ohio's termination rule provides that a lawyer may withdraw from representation if the client persists in a course of action that the lawyer "reasonably believes" is illegal or fraudulent, replacing the word "criminal" in MR 1.16 with "illegal." This expands the types of actions for which a lawyer may withdraw from representation.[187] OH Rule 1.16 highlights the fact that a lawyer may withdraw from representation if a client fails to substantially fulfill financial obligations[188] and, unlike MR 1.16(b), further provides that a lawyer may withdraw from representation if the client gives informed consent to the termination or if the lawyer sells the law practice.[189] Like MR 1.16(c), the Ohio rule requires that a lawyer obtain permission from the tribunal if required to do so, but Ohio words this requirement differently.[190] Ohio's termination of representation rule further provides that a lawyer must return client papers and property promptly, noting that "client papers and property"

[182] ". . . a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if . . . ." ND Rule 1.16(a).

[183] ". . . a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if . . . the lawyer reasonably believes that the representation will result in violation of these Rules or other law. . ." ND Rule 1.16(a)(1).

[184] ". . . a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if . . . the lawyer has offered material evidence in the testimony of the client and has come to know of its falsity and the client has refused to consent to disclosure of its false character to the tribunal . . . ." ND Rule 1.16(a)(3).

[185] "Where the lawyer has sought to withdraw in accordance with paragraph (a)(3) and withdrawal is not permitted, the lawyer may continue the representation without disclosure of the client's false testimony; such continuation alone is not a violation of these Rules." ND Rule 1.16(d).

[186] *Id.*

[187] ". . . a lawyer may withdraw from the representation of a client if any of the following applies . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or fraudulent . . . ." OH Rule 1.16(b)(2) (emphasis in original).

[188] ". . . a lawyer may withdraw from the representation of a client if any of the following applies . . . the client fails substantially to fulfill an obligation, financial or otherwise, to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled . . . ." OH Rule 1.16(d)(2) (emphasis in original).

[189] ". . . a lawyer may withdraw from the representation of a client if any of the following applies . . . the client gives informed consent to termination of the representation; or . . . the lawyer sells the law practice in accordance with Rule 1.17 . . . ." OH Rule 1.16(b)(7) and (8).

[190] "If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission." OH Rule 1.16(c).

may include correspondence, deposition transcripts, and exhibits, as well as other documents reasonably necessary to the client's representation.[191]

South Carolina

South Carolina's rule regarding termination of representation makes one slight addition to subsection (b)(5), providing that a lawyer may withdraw from representation if the client substantially fails to, among other things, fulfill a payment to the lawyer after being given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.[192]

Tennessee

Tennessee's termination of representation rule allows a lawyer to withdraw from representation if the client insists upon taking action that the lawyer considers repugnant or imprudent,[193] while the Model Rule permits a lawyer to withdraw from representation if the client insists upon taking action that the lawyer considers repugnant or "with which the lawyer has a fundamental disagreement." In addition, TN Rule 1.16(b)(6) provides that a lawyer may withdraw from representation if representation would result in an "unanticipated and substantial financial burden,"[194] while MR 1.16(b)(6) instead provides that a lawyer may withdraw from representation if representation would result in an "unreasonable financial burden." TN Rule 1.16 also provides that a lawyer may withdraw from representation if the client gives informed consent confirmed in writing.[195] While MR 1.16(d) provides that "[u]pon termination of representation," a lawyer must take steps to the extent reasonably practicable to protect a client's interests, TN Rule 1.16(d) makes clear that such steps must be taken both when a client discharges the lawyer and when a lawyer terminates the representation.[196] In addition to the steps that must be taken upon termination set forth in MR 1.16(d), TN Rule 1.16(d) also requires that a lawyer cooperate with any successor counsel engaged by the client, promptly return any work product prepared by the lawyer for which the lawyer was compensated, and promptly return any other attorney work product (though the lawyer may retain work product to the extent permitted by law if retaining it will not have a materially adverse effect on the client).[197]

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[191] "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation." OH Rule 1.16(d).

[192] ". . . a lawyer may withdraw from representing a client if . . . the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services or payment therefore and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled . . ." SC Rule 1.16(b)(3) (emphasis added).

[193] ". . . a lawyer may withdraw from representing a client if . . . upon taking action that the lawyer considers repugnant or imprudent . . . ." TN Rule 1.16(b)(4).

[194] ". . . a lawyer may withdraw from representing a client if . . . the representation will result in an unanticipated and substantial financial burden on the lawyer or has been rendered unreasonably difficult by the client . . . ." TN Rule 1.16(b)(6).

[195] ". . . a lawyer may withdraw from representing a client if . . . the client gives informed consent confirmed in writing to the withdrawal of the lawyer." TN Rule 1.16(b)(8).

[196] "A lawyer who is discharged by a client, or withdraws from representation of a client, shall, to the extent reasonably practicable, take steps to protect the client's interests. Depending on the circumstances, protecting the client's interests may include: (1) giving reasonable notice to the client; (2) allowing time for the employment of other counsel; (3) cooperating with any successor counsel engaged by the client; (4) promptly surrendering papers and property to which the client is entitled and any work product prepared by the lawyer for the client and for which the lawyer has been compensated; (5) promptly surrendering any other work product prepared by the lawyer for the client, provided, however, that the lawyer may retain such work product to the extent permitted by other law but only if the retention of the work product will not have a materially adverse effect on the client with respect to the subject matter of the representation; and (6) promptly refunding any advance payment of fees that have not been earned or expenses that have not been incurred." TN Rule 1.16(d).

[197] *Id.*

Texas

Texas' termination of representation rule, numbered 1.15, retains some language from previous versions of MR 1.16. For example, TX Rule 1.15, unlike MR 1.16, requires that a lawyer withdraw from representation if the representation will result in violation of TX Rule 3.08 (lawyer serving as a witness) or if the lawyer's psychological condition materially impairs the lawyer's ability to represent the client.[198] Further, this section makes clear that a lawyer can be discharged by a client with or without good cause.[199] Instead of providing that a lawyer may withdraw under certain circumstances like MR 1.16(b), TX Rule 1.15's permissive withdrawal section provides that a lawyer *shall not* withdraw unless the circumstances listed in that section apply, but the practical effect of this language is the same as that of MR 1.16(b).[200] TX Rule 1.15 also provides that a lawyer may withdraw from representation if a client insists upon pursuing an objective that the lawyer considers imprudent, in addition to pursuing an objective that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.[201] Further, TX Rule 1.15(b) explicitly permits a lawyer to withdraw from representation if the client fails to substantially fulfill its obligation to pay the lawyer's fee.[202] Finally, TX Rule 1.15(d) permits a lawyer to retain a client's file "only if such retention will not prejudice the client in the subject matter of the representation."[203]

Utah

Utah's rule regarding termination of representation makes one change. Unlike MR 1.16(d), which permits a lawyer to retain papers relating to the client as permitted by law, UT Rule 1.16(d) requires that, upon the request of a client, a lawyer must provide the client with his or her file, but may reproduce and retain copies of the client's file at the lawyer's own expense.[204]

Virginia

In addition to retaining language from past versions of MR 1.16, Virginia's rule for terminating representation provides that a lawyer may withdraw from representation if the client persists in a course of action that the lawyer reasonably believes is "illegal or unjust," replacing "criminal or fraudulent" found in MR 1.16(b)(2) and expanding the types of conduct for which a lawyer may withdraw.[205] Virginia also adds section (e), which extensively summarizes the manner in which a lawyer must handle

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[198] "A lawyer shall decline to represent a client or, where representation has commenced, shall withdraw, except as stated in paragraph (c), from the representation of a client, if: (1) the representation will result in violation of Rule 3.08, other applicable rules of professional conduct or other law; (2) the lawyer's physical, mental, or psychological condition materially impairs the lawyer's fitness to represent the client; or (3) the lawyer is discharged, with or without good cause." TX Rule 1.15(a).

[199] *Id.*

[200] "Except as required by paragraph (a), a lawyer shall not withdraw from representing a client unless . . . ." TX Rule 1.15(b).

[201] ". . . a lawyer shall not withdraw from representing a client unless . . . a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement . . . . " TX Rule 1.15(b)(4).

[202] ". . . a lawyer shall not withdraw from representing a client unless . . . the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled . . . ." TX Rule 1.15(b)(5).

[203] "The lawyer may retain papers relating to the client to the extent permitted by other law if such retention will not prejudice the client in the subject matter of the representation." TX Rule 1.15(d).

[204] "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense." UT Rule 1.16(d).

[205] ". . . a lawyer may withdraw from representing a client if . . . the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is illegal or unjust . . . ." VA Rule 1.16(b)(2).

client records.[206] Notably, section (e) prohibits a lawyer from withholding documents or failing to meet certain client requests relating to records due to a client's failure to pay fees and costs owed to the lawyer.[207] A lawyer, however, is not required to provide a client with copies of billing records and documents intended for internal use.[208]

Washington

Washington is another state that makes only slight changes to its rule regarding termination of representation. WA Rule 1.16(a) provides that a lawyer *must* withdraw from representation under certain enumerated circumstances, notwithstanding Revised Code of Washington 2.44.040, which sets forth rules for the change of attorneys.[209]

[206] "All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation." VA Rule 1.16(e).

[207] *Id.*

[208] *Id.*

[209] ". . . a lawyer shall not represent a client or, where representation has commenced, shall, notwithstanding RCW 2.44.040, withdraw from the representation of a client if . . . ." WA Rule 1.16(a).

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Michelle Carney

David Bloomfield

Reid Trautz

Maheen Taqui

Melissa Chavin

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American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 1.18
Duties to Prospective Clients

Sherry K. Cohen, Reporter

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MODEL RULE 1.18 DUTIES TO PROSPECTIVE CLIENTS

Introduction

As many immigration lawyers know, not every telephone conversation or in-person meeting with a potential client results in a signed engagement agreement. Some potential clients may decide that they cannot afford the fee and will advise the lawyer immediately that they do not intend to engage the lawyer. Others may say they need more time to consider the representation, but then never get back to the lawyer with their decision. And then there is the situation in which, of course, the lawyer who may decline to accept the representation for any number of reasons. Such interactions with persons or entities, colloquially referred to as potential clients, may under certain circumstances be deemed "prospective" clients subject to certain protections under MR 1.18.[1]

In addition to the more conventional lawyer/potential client interactions described above, a "prospective client" relationship may be created inadvertently, even in an unlikely case in which a lawyer uses an overly broad voicemail greeting which invites a caller to leave a "detailed" voice-mail message about the caller's particular legal problem. If the purpose of the call is to explore the possibility of retaining counsel and the message includes confidential information, the caller might be deemed a prospective client within the meaning of MR 1.18. If so, the information provided by the caller may be deemed confidential and subject to the protections of MR 1.18.[2]

Protections under MR 1.18 may apply to other inadvertently created prospective client relationships though interactions on Twitter and other social media, such as Facebook or LinkedIn. Although an immigration lawyer may be able to address a query on Twitter in a generalized manner without creating a prospective client relationship, that may not be the case if the tweet results in a one on one communication, or if the interaction is through instant messenger or chat. On line platforms such as Avvo also have the potential to create prospective client relationships. Inadvertent prospective client relationships may also be created when an immigration lawyer interacts with persons interested in representation at community or church based events, at which the purpose of the lawyer's appearance is to provide only general advice. Although many lawyers may still assume that no

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[1] As will be discussed further, the phrase "prospective client" is a term of art which is defined in MR 1.18. Prospective clients are also treated in Section 15 of Restatement (Third) of the Law Governing Lawyers ("Restatement") which provides as follows:

(1) When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter and no such relationship ensues, the lawyer must:

(a) Not subsequently use or disclose confidential information learned in the consultation, except to the extent permitted with respect to confidential information of a client or former client as stated in §§ 61-67;

(b) Protect the person's property in the lawyer's custody as stated in §§ 44-46; and

(c) Use reasonable care to the extent the lawyer provides the person legal services.

(2) A lawyer subject to Subsection (1) may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer or another lawyer whose disqualification is imputed to the lawyer under §§ 123 and 124 has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter, except that such a representation is permissible if: (a)(i) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c); or

(b) both the affected client and the prospective client give informed consent to the representation under the limitations and conditions provided under § 122.

[2] Immigration lawyers also receive unsolicited requests for representation from people who are incarcerated. A lawyer is under no obligation to respond to an unsolicited query (and the same should apply in social media) under NYSBA Op. 1111 (1/17/17) unless such refusal amounts to unlawful discrimination.

confidentiality or other ethical obligations are imposed in the above scenarios as long as there is no formal retention, such lawyers would be mistaken.

MR 1.18, the subject of this chapter, addresses the lawyer's duties to "prospective" clients, as defined in the rule. Because the lawyer's interaction with the prospective client is limited in time and depth, the prospective client receives only some of the protection given to other clients, and even this more limited protection only applies when a prospective client relationship is formed. MR 1.18 gives prospective clients almost all protection afforded to former clients regarding confidentiality, but less protection on conflicts of interests. MR 1.18 contains four paragraphs. The first paragraph, MR 1.18(a), defines the term prospective client as a person who consults a lawyer about the possibility of engaging the lawyer with respect to a matter. The definition combined with the comments to MR 1.18 rule out situations in which a person provides information to a lawyer unilaterally or in bad faith, with a view to creating a disqualifying conflict of interest. The second paragraph, MR 1.18(b), extends essentially the same limitations on the use or disclosure of confidential information as would be applied to a former client under MR 1.9. The third paragraph, MR 1.18(c), imposes a duty to avoid a conflict of interest in a matter involving a prospective client under circumstances similar to the duty to avoid conflicts between a former and current client: the lawyer is prohibited from representing a prospective client in a matter that is the same or substantially similar to a current client's matter. MR 1.18(c) adds a limitation to the prohibition by requiring that in order for the prohibition to be applied, the lawyer must also have received information from the prospective client that is "substantially harmful" to the current client. As in the case of MR 1.18(b), the protection afforded a prospective client under MR 1.18 is not as great as that afforded a former client. The third paragraph also makes reference to the exceptions to a conflicted representation set forth in the fourth and last paragraph, MR 1.18(d).

MR 1.18(d) provides two exceptions that permit a lawyer to go forward with a representation despite a prospective client conflict. MR 1.18(d)(1), as in the case of the current and former client conflict rules, permits a conflicted representation if the lawyer obtains the informed consent of the affected client (current or former) and the prospective client. Under MR 1.18(d)(2), a disqualified lawyer's conflict will not be imputed to another lawyer practicing in the same firm if the lawyer took reasonable measures to avoid receipt of "more" confidential information than that necessary to determine if there is a conflict in the first instance *and* the disqualified lawyer is timely screened from participating in the matter or directly receiving part of the fee, and notice of the representation is provided to the prospective client.

As with many other professional responsibility rules, MR 1.18 should not be read in a vacuum.[3] For example, MR 1.6, concerning confidential information, and MR 1.7 concerning concurrent conflicts of interest provide the core principles underlying MR 1.18.[4] MR 1.6 requires a lawyer to maintain the confidentiality of client

[3] By way of background, lawyers should be familiar with the significant number of Model Rules (and the state versions of those rules) concerning confidentiality and conflicts of interest that apply when a lawyer-client relationship has been established. MR 1.7 addresses the protections owed to a current client with respect to conflicts of interest, and the related duty of confidentiality. MR 1.8, entitled "Current Clients: Specific Rules," presents rules concerning conflicts involving other relationships between a lawyer and a current client that might unfairly benefit the lawyer. MR 1.9 concerns conflicts that may arise with respect to a former client. MR 1.10 concerns imputation of a client conflict of one lawyer to other lawyers or law firms. There are other Model Rules that must also be considered by lawyers burdened by conflicts of interest and the obligation to preserve the confidentiality of client information. They include MR 1.1 (lawyer's duty to render competent representation), MR 1.3 (lawyer's duty to render diligent representation), MR 1.6 (lawyer's duty to protect confidentiality of client information) and MR 1.16 (permissive and mandatory withdrawal; duty to avoid prejudice). The latter rules, of course, apply to any type of representation. Although we briefly discuss those rules in the context of MR 1.18 in this EC, lawyers are advised to review the ECs for a full discussion of those rules. See http://www.aila.org/compendium.

[4] As will be noted throughout this chapter, immigration lawyers should always check the applicable state version of any Model Rule, including MR 8.5 concerning jurisdiction and choice of law. State professional responsibility rules are generally published by the respective bar associations online. The ABA also publishes comparisons of the ABA and State rules which is available at http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html. A benefit of consulting the ABA chart is to learn whether a particular state has adopted an ABA rule verbatim. Where there are

information obtained during the course of the representation, with certain exceptions. MR 1.7, which provides the highest level of protection, prohibits representation of different current clients: (1) when the representation of one client is "directly adverse" to another client or (2) when the representation of one client presents a substantial risk that the lawyer's representation of that client will be materially limited by the interests of another client. Also, relevant to understanding MR 1.18 is MR 1.9, dealing with former clients. MR 1.9, which provides less protection, prohibits a lawyer from representing a current client in a matter that is the same or substantially related to a matter involving a former client. The basic precept of both MR 1.7 and MR 1.9 is that a lawyer must avoid any representation in which the lawyer's ability to provide competent and diligent representation to one or more clients is materially compromised by representation of another client. MR 1.18 which provides the least protection extends similar protection to a "prospective client" but the duties imposed under the rule are less restrictive than comparable duties owed to current and former clients.[5]

This chapter will include a comprehensive discussion of MR 1.18. We begin by discussing some key terms or concepts used in MR 1.18 followed by commentary and annotations for each sub-section of the rule, including citations to and discussion of ethics opinions and disciplinary decisions. We will provide examples of prospective client conflicts in the immigration context throughout the chapter. We will discuss, as a special area of concern, prospective client conflicts in the context of lawyer websites, other internet interactions and so-called "beauty contests."

A. Text of Rules

ABA Model Rule 1.18—Duties to Prospective Clients

To review the full text of MR 1.18 and the comments, please visit the Model Rules of Professional Conduct: Table of Contents on the American Bar Association's website.

B. Key Terms and Phrases

"Consult or Consultation"

The word "consult" is used in MR 1.18(a) in defining a "prospective client." As set forth in Comment 2 to MR 1.18, a person becomes a prospective client when he "consults" with the lawyer about the possibility of forming a lawyer-client relationship "without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's [ethical] obligations." The word "consult" is not a defined term under MR 1.0,[6] but is generally understood to be the act of a person seeking information or advice from someone, especially an expert or professional.[7] In the context of a prospective client, the lawyer invites the disclosure of information pertaining to a particular legal matter and the prospective client has a reasonable expectation that the lawyer is receptive to establishing a lawyer client relationship.[8]

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differences, the chart shows the literal word by word differences without analysis or context. We include in this chapter, and all others, a summary of state variations from MR 1.18, with reference to Comments when necessary. See Summary of State Variation of MR 1.18 at pp. 14-35.

[5] See Hazard and Hodes, The Law of Lawyering (3d ed. 2005), Sec. 21A.6, at 21A-15 ("Because the relationship between a prospective client and a lawyer by definition never reaches the stage where the duty of loyalty attaches with full force, [MR 1.18] imposes a less stringent regime on the lawyer than where actual and former clients are involved. Put another way, the protections afforded to prospective clients are not as extensive as those provided to 'real' clients.")

[6] Lawyers should always check the applicable state's version of "Terminology" (Rule 1.0) to determine any variations. For example, Minn. Rule 1.0(c) defines the term "consult" but it is not defined in the Model Rules. Minn. Rule 1.0(c) provides that "consult" or "consultation" denotes "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

[7] See definition of "consult" at https://en.oxforddictionaries.com/definition/consult.

[8] As reflected in the ABA COMMISSION ON ETHICS 20/20: RESOLUTIONS AND REPORTS (AUGUST 2012), MR 1.18(a) was amended to clarify the nature of the type of communication that gives rise to a prospective lawyer-client relationship by replacing the pre-amendment term "discusses" with "consults" and including new Comment language, which

"Informed Consent"

"Informed consent" is a term used in MR 1.18(d)(1). A prospective client conflict may be waivable if, among other criteria, each affected party gives informed consent to the conflict. As defined in MR 1.0(e) informed consent denotes "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explained about the material risks of and reasonably available alternatives to the proposed course of conduct." For a client to waive a conflict, a lawyer must disclose and explain to the client the nature of the conflict and all of the circumstances and foreseeable ways that the conflict could adversely affect the client's interests.[9] For example, the lawyer would need to explain the risks that the lawyer's duty to provide competent and diligent representation to one client could be impaired by the lawyer's same duty to the prospective client. *We discuss the concept of informed consent in more detail at pp. 14-14.*

"Confirmed in Writing"

"Confirmed in writing" is a term used in MR 1.18(d)(1). A conflict may be waivable if, among other criteria, each affected party's informed consent is "confirmed in writing." As defined in MR 1.0(b), when the phrase is used in reference to the "informed consent" of a person, it denotes consent "that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent." As noted in the definition, if a lawyer is unable to "obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter." The term "writing" or "written" as defined in MR 1.0(n) is a "tangible or electronic record of a communication or representation" that includes "handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications." The concept of "confirmed in writing" does not require the client to sign the document, but prudent lawyers will strongly consider obtaining client signatures when feasible. *We discuss the term "confirmed in writing" in more detail at pp. 14-15.*

"Firm"

The term firm is used in MR 1.18(c) which concerns, among other things, the imputation of a conflict to another lawyer in a firm with which the disqualified lawyer is associated. Under MR 1.0(c) the term "'[F]irm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization."

"Substantially"

The term "substantially" is used in MR 1.18(b) which tracks the language of MR 1.9(a) but as applied to "prospective" client conflicts. MR 1.0(l) defines the term "substantial "as [denoting] a material matter of clear and weighty importance." For conflict purposes, matters are "substantially related" if "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter."[10]

"Reasonable or Reasonably"

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takes into consideration internet-based interactions, which are not necessarily in-person or telephone two-way conversations. Available at https://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html.

[9] See Comment 8 to MR 1.7.

[10] See Comment 3 to MR 1.9.

The terms reasonable and reasonably are used in MR 1.18(d)(2) to characterize steps taken by the disqualified lawyer to limit receipt of confidential information when a conflict has been imputed. Under MR 1.0(h) the terms denote the conduct of a reasonably prudent and competent lawyer, in other words a "reasonable lawyer test" which is an objective standard.

"Screened"

The term "screened" is used in MR 1.18(d)(2) which sets forth the circumstances under which representation may proceed when a conflict is imputed. Under MR 1.0(k), the term screened "denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law." MR 1.10 entitled "Imputation of Conflicts" sets for the criteria for adequate screening.

C. Annotations and Commentary

MR 1.18(a)

MR 1.18(a) provides that a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client."

MR 1.18(a) defines a "prospective client" in the rule, presumably because it is not an otherwise defined term and the rule imposes obligations only when a "prospective client" relationship is formed.[11] As set forth in Comment 2 to MR 1.18, a person becomes a prospective client when he "consults" with the lawyer about the possibility of forming a lawyer-client relationship "without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's [ethical] obligations." As discussed previously, the word "consult" is not a defined term under MR 1.0,[12] but is generally understood to be the act of a person seeking information or advice from someone, especially an expert or professional.[13]

The key factor in determining whether a "consultation" has taken place is whether the lawyer requested or invited the disclosure of information related to the matter at hand. A consultation involves the lawyer's invitation to provide information and a response in pursuit of a lawyer-client relationship.[14] Accordingly, a consultation does not occur if a person communicates information to a lawyer unilaterally, such as providing information to lawyer (1) in response to a general advertisement that provides basic information about the lawyer or a particular legal problem or (2) as a result of a lawyer's positive reputation within the community. When the communication is made unilaterally, the person cannot have a "reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship."[15] Similarly, a person who communicates with a lawyer only

[11] The definition of a prospective client in MR 1.18 is much narrower than the same phrase used in MR 7.3, which addresses "Direct Contact with Prospective Clients" in the context of advertising.

[12] Lawyers should always check the applicable state's version of "Terminology" (Rule 1.0) to determine any variations. For example, Minn. Rule 1.0(c) defines the term "consult" but it is not defined in the Model Rules.

[13] See definition of "consult" at https://en.oxforddictionaries.com/definition/consult.

[14] As noted in Comment 2, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. If there is no consultation as explained in the Comment, the person is not deemed "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

[15] Iowa Ethics Op. 07-02 (2007) (lawyer's voicemail greeting that simply asks for contact information is not a request for confidential information); San Diego County Ethics Op. 2006-1(unsolicited email from driver in accident case revealing that

for the purpose of disqualifying the lawyer, by definition, could not have had a "reasonable" expectation of forming a lawyer-client relationship in the first place, and would not be entitled to the protections afforded a "prospective client."[16] The prudent and conscientious lawyer should limit the nature and extent of the information provided by a prospective client "in depth and time" in order to reduce the risk of a subsequent disqualification if either the prospective client or the lawyer decline to go forward with a representation.[17]

A recent New York State Bar Association Ethics Opinion noted that whether a person is a "prospective client" is one of fact.[18] In the scenario addressed in the opinion, the lawyer had represented a husband and wife in an estate matter. The will provided that if the wife pre-deceased the husband the proceeds of the estate would go to the wife's children from a former marriage. The wife died first and under the will the husband was supposed to fund a trust for the benefit of the wife's children. After the husband died, the successor trustee (the husband's sister) met with the lawyer regarding administration of the trust and disclosed that the husband had not funded the trust, but put the funds in his own name for the benefit of the sister. The opinion assumed, for purposes of analyzing Rule 1.18, that the sister would be deemed a prospective client where it could be implied from the course of conduct between the sister and the lawyer that the sister had sought legal advice concerning the trust which the lawyer declined to provide. The fact that the lawyer advised the sister that he could not represent her was seen as evidence that the sister had a reasonable expectation that the lawyer was willing to discuss the possibility of forming a lawyer-client relationship in the first instance.[19]

MR 1.18(b)

MR 1.18(b), pertaining to confidential information, provides that "[e]ven when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."

How must a lawyer treat information provided by a prospective client? Does a lawyer owe the same duty of confidentiality to a prospective client as the duty owed to a current "client" or a "former client"?

MR 1.18(b) expresses the core requirement of the rule, i.e., that information learned from a prospective client in a consultation is protected whether or not any lawyer-client relationship is established. The lawyer may not use or disclose the prospective client's information in a matter involving a current client, except in the scenarios

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she had consumed alcohol before accident was not deemed confidential; lawyer not disqualified representing accident victim or prevented from using the information to the disadvantage of the caller).

[16] See Comment 2.

[17] See NYSBA Ethics Op. 1126 (June 19, 2017) ("Meetings and other communications that do not focus on a particular representation, such as introductory or general promotional calls or visits, as well as social meetings, by themselves *generally* should not give rise to prospective client duties." (Emphasis added) Although Texas has not adopted a version of MR 1.18, a Texas Bar opinion concerning a lawyer's duty to a prospective client who responds to a law firm website provides advice which is consistent with MR 1.18. Texas Center for Legal Ethics and Practice Op. 651 (where website solicits email communication from potential client without effective warnings concerning confidentiality, law firm's lawyers may be required to treat information received as confidential and not available for use against the person transmitting the information).

[18] See NYSBA Ethics Op. 1126 (June 19, 2017) (Under NY's Rule 1.18, lawyer must keep as confidential information received from a prospective client which if revealed on one hand would hurt prospective client and on the other hand if not disclosed would be adverse to deceased former client's children and might even be deemed a past crime).

[19] See also Miness v. Ahuja, 762 F. Supp. 2d 465 (E.D.N.Y. July 31, 2010) (the defendant was a prospective client subject to the protections of New York's Rule 1.18 because the lawyer and the defendant had a close personal relationship over time in which each shared significant business-related issues, one of which included the current defendant's disclosure of significant details of events that took place between the defendant and the plaintiff prior to the lawsuit. During some of the discussions, the lawyer offered his legal services to the defendant and continued to meet with the defendant socially, discuss with him issues related to the case at hand, and repeated his offer of representation).

pertaining to the lawyer's obligation to "former clients" under MR 1.9. MR 1.18 treats prospective clients more like former clients than non-clients and, accordingly, lawyers must be familiar with the requirements of MR 1.9. They must also be familiar with MR 1.6 which imposes the basic duty of confidentiality in the first instance. We discuss those rules in more detail below starting with MR 1.6.

MR 1.6 is titled "Confidentiality of Information," but the word "confidential" is not used in the text of the rule; nor is it a defined term under MR 1.0. Rather, the term is described in the broadest sense in Rule 1.6(a) as "information relating to the representation."[20] The phrase encompasses not only information otherwise protected by statute or common law, e.g., the lawyer-client privilege and work-product, but also all information arising from or concerning the representation, such as public information. In this respect, MR 1.6 differs from MR 1.18 in that the latter protects only information *provided by the prospective client.*[21] Because MR 1.6 is triggered only when there is an established lawyer-client relationship, the proscriptions against disclosing confidential information under MR 1.6 are very broad and may only be waived when the client gives express informed consent to disclosure or under circumstances in which consent is implied.[22] Typical examples of confidential information in the immigration context would include revelation of the person's immigration status, previous criminal and immigration history (including violations), history as a crime victim, medical history, marital or other family problems, and employment issues.

MR 1.9 imposes ethical duties owed to "former" clients.[23] The first paragraph of the rule [MR 1.9(a)] [MR 1.0] prohibits a lawyer from representing a current client in a matter that is the "same or substantially related" to the lawyer's representation of a former client, if the current client's interests are "materially adverse" to those of the former client, "unless the former client gives informed consent, confirmed in writing." The second paragraph incorporates the concept of imputation of a former client conflict to another lawyer or law firm with whom the conflicted lawyer is associated if the interests of the current client are materially adverse to the former client *and* if the lawyer acquired material information from the former client that is confidential under MR 1.6 and subject to the specific protections under MR 1.9(c), discussed below.[24] Under MR 1.9(c), a lawyer is prohibited from disclosing "information relating to the representation" of the former client or from using such information to the disadvantage of the former client. As applied to prospective clients under MR 1.18, if information provided by a prospective client indicates a conflict of interest requiring the lawyer to decline the representation, the lawyer may not ***disclose*** that information to an existing client or anyone else.[25] A lawyer who has received confidential

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[20] See MR 1.6(c).

[21] An immigration lawyer may receive confidential information about a prospective client from a third party, such as a friend or relative. In such cases, in order for that information to come within the reach of MR 1.18, there would have to be some indication that the third party is acting as a representative of the client.

[22] For a comprehensive discussion of the duty of confidentiality see EC for MR 1.6 at 5-1 (pg. 139).

[23] Rule 1.9 does not expressly set forth duties owed to prospective clients, but as discussed is incorporated by reference in MR 1.18.

[24] The complete text of MR 1.9 and Comments may be found at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients.html and http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients/comment_on_rule_1_9.html, respectively.

[25] See Comment 3 to MR 1.18 which provides as follows:

It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) [of MR 1.18] prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the representation. The duty exists regardless of how brief the initial conference may be.

information from a prospective client also may not ***use*** the information in pending litigation or a transactional matter to the disadvantage of the former client, even if the lawyer does not disclose the information.

MR 1.9(c) incorporates exceptions to a lawyer's use and disclosure of confidential information as other Model Rules permit and declares one further exception. With respect to use of confidential information only, MR 1.9(c) permits a lawyer to use "information relating to the former representation" if the information "has become generally known."[26] This differs from the treatment of confidential information under MR 1.6 which, as discussed above prohibits a lawyer from using or disclosing client information even if it is publicly available.[27]

Minimizing Receipt of Disqualifying Confidential Information

Despite the temptation to engage in a substantive discussion with a prospective client about the factual basis of the legal matter at issue, in order to avoid conflicts arising from receipt of otherwise confidential information, best practice is to have an initial phone call or in-person contact with a prospective client during which the lawyer obtains only enough information to run a conflicts check. Before getting substantive client information, the lawyer may ask the individual to identify the parties involved, the nature of the problem, and the legal issues involved. If the matter involves a legal entity, the lawyer should ask for the names of related entities, including parent and subsidiary corporations. If there is no discernable conflict at the outset and an interview is set-up, the prudent and conscientious lawyer should consider preparing scripted guidelines to make clear that the lawyer only intends to learn enough information to determine whether the lawyer or the client may agree to the representation. Such steps will also avoid the risk that a prospective client may mistakenly believe a lawyer-client relationship has been formed.[28]

The model rules do not define the phrase "lawyer-client relationship," but under common law a lawyer-client relationship, which triggers the lawyer's ethical obligations to the client, including the duty of confidentiality, is formed when the client reasonably believes the lawyer is representing his interests and/or providing him with

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See also ABA Formal Ethics Op. 10-457 (comprehensive discussion of prospective client conflicts) New Jersey Ethics Op. 695 (2004) (lawyer may not tell corporate client that employee has contacted law firm about suing corporation).

[26] See Comment 8 to MR 1.9 ([8] ("…the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client").

[27] See NYSBA Ethics Op. 1126 (June 19, 2017) (makes clear that duty of confidentiality must be observed even when lawyer declines representation regarding administration of trust; lawyer prohibited from disclosing to wife's children that trust established by their mother had not been administered according t0 trust agreement).

[28] See Kentucky Bar Ethics Opinion E-316 (Jan. 1, 1987) ("an attorney-client relationship may be established by the client's reasonable and detrimental reliance on the lawyer to provide legal services."). The value of taking steps to avoid an unintended lawyer-client relationship or prospective client conflict is reflected in the following representational cases. See, e.g, Vermont Advisory Ethics Opinion 2000-10 (Under Rule 1.7 and 1.9. lawyer who disclosed a potential conflict to caller who sought to retain lawyer by divulging general nature of employer-employee disagreement, potential litigation and name of employer [now a prospective client] should not be disqualified from representing employer where lawyer explained upfront to caller that a conflict existed and caller would have to seek legal representation elsewhere; however, lawyer may not inform employer of the telephone call and its content, the identity of the caller or nature of call to the current client without consent); Jimenez v. Rivermark Cmty. Credit Union, D. Or., No.3:15-CV-00128-BR (May 12, 2015) (law firm not disqualified from representing defendant under Oregon's version of Rule 1.18, as there was no implied lawyer-client relationship between the debtor-plaintiff and the firm on the basis of a telephone inquiry from the plaintiff where lawyer advised plaintiff up front that it did not handle the type of case alleged, that it frequently represented creditors in collection matters and where the lawyer did not receive "significantly harmful" information as defined by that rule); Cargould v. Manning, Ohio Ct. App. 10th Dist., NO. 09AP-194 (November 5, 2009) (lawyer who may have met once with a husband about a divorce case and allegedly learned unspecified sensitive information from him is not disqualified from representing wife in same action where husband failed to provide evidence to prove that he had actually met lawyer or provided confidential information).

legal guidance.[29] The client does not have to pay the lawyer any fees; the lawyer does not have had to spend extensive time with the client; and, the client does not have to sign a written agreement to employ the lawyer. Simply put, a lawyer-client relationship may be inferred from the circumstances. If a person comes to the lawyer for legal advice through any medium and in any setting, showing a desire, express or implied, for representation, and reasonably believes he is getting legal advice from the lawyer, a lawyer-client relationship will be established.[30]

When the lawyer-client communication is via the Internet, the prudent and conscientious lawyer should consider setting out guidelines as to confidentiality in all written communications. If it appears that the lawyer is not being retained, it is good practice to provide the prospective client a non-engagement letter, although it is not required under MR 1.18. Such letters would still require the lawyer to maintain the confidentiality of prospective conflict information. As a practical matter, lawyers who seek to avoid running afoul of obligations set forth in MR 1.18 may consider keeping accurate records of all contacts with non-retained clients.

In the immigration context, prudent and conscientious lawyers who use "intake" forms when meeting prospective clients for the first time should make sure the forms limit the extent and nature of the information obtained. Immigration lawyers should also be mindful when using paralegals to obtain such information because it will be presumed to have been imparted to the lawyer. Because immigration lawyers often need to gather a lot of details before deciding what remedies are available to a prospective client and the type and amount of the fee to be charged, prevention of a prospective client relationship which may trigger a future conflict of interest may simply be unavoidable. As a general matter, all immigration lawyers should advise prospective clients about how confidential information will be treated prior to any interaction with the person.

MR 1.18(c)

MR 1.18(c) provides that "A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d)."

MR 1.18(c) has two prongs. The first prong sets forth the factors establishing a prospective client conflict. The second prong sets forth the circumstances under which one lawyer's prospective client conflict may be imputed to another lawyer or law firm.

Prong One of MR 1.18(c): Factors That Lead to a Prospective Client Conflict

Under MR 1.18(c), a lawyer who has a prospective client conflict is prohibited from representing a current client if: (1) the representation must be "materially adverse" to the prospective client, (2) the representation is in the same or substantially related matter, and (3) the lawyer receives information from the prospective client that could be significantly harmful. The prospective client conflict arises in the first instance from the fact that under MR 1.18(b) the lawyer may not disclose or use information obtained from the prospective client without his or her informed consent. By definition, this prohibition would interfere with the lawyer's ability to provide competent and diligent representation to the current client. Although the key terms employed in the conditions above have been identified in the Key Terms and Phrases section at pp. 14-3, we discuss them in greater detail below.

[29] Restatement of the Law Governing Lawyers §14. Formation of a Client-Lawyer Relationship.
[30] *See e.g., Attorney Grievance Committee v. Shoup,*201 P.2d 442 (2009) (by talking too much with a friend about his legal problem and making specific statements about what should be done, a lawyer can give the reasonable impression that he is providing legal advice to the friend, thereby creating a lawyer-client relationship.

Materially Adverse

MR 1.18(b) tracks the language in MR 1.9(a) except that it applies to "prospective" clients rather than "former" clients. Under MR 1.9, one element is that the conflicting interests between the former and current client must be "materially adverse" and it applies to prospective clients as well. The term "material" is not defined in the rules, but it is a commonly used term in matters of law, generally meaning something very "important," "necessary" or "relevant" to a substantive aspect of a matter.[31] Whether interests are materially adverse will of course depend on the circumstances. If a current client and a prospective client are opposite parties in a litigation or a transactional matter, it is obvious that their respective interests would be materially adverse. Material adversity may also be established in less direct circumstances such as when a lawyer may have to cross-examine a former-client [or prospective client] on issues that involved the prior consultation where the lawyer was asked to represent the witness in a similar matter.[32]

An example of material adversity in the immigration context can include a prospective client telling a lawyer that her boyfriend physically abuses her. The prospective client and boyfriend then break up and two months later the abusive boyfriend reaches out to the same lawyer asking her to represent him in an adjustment of status case.

Substantially Related

MR 1.18(b) tracks the language of MR 1.9(a) except that it applies to a "prospective" client rather than "former" clients. The same or substantial relationship test is the same. MR 1.0(l) defines the term "substantial "as [denoting] a material matter of clear and weighty importance." The determination as to whether matters are substantially related is, as in the case of conflicts in general, fact sensitive.[33] Comment 3 to Rule 1.9 provides that matters are "substantially related" if "they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." The same applies to a prospective client under MR 1.18. A recent Second Circuit decision disqualifying criminal defense counsel applied that standard in finding that a current criminal trial and former civil investigation were substantially related because "they involved the same facts and circumstances…and [u]nder the former client rule there was an irributtable presumption that confidences were shared."[34] The court disqualified the criminal defense lawyers from representing a corporation's employees at trial where the same lawyers had conducted an internal fraud investigation on behalf of the corporation.

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[31] See definition of "material" in Black's Law Dictionary.

[32] See FMC Techs., Inc. v. Edwards, 420 F. Supp. 2d 1153 9W.d. Wash. (2006); see also Colorpix Sys. Of Am. V. Broan Mfgs, 131 F.Supp.2d 331 (D. Conn. 2001) (a lawyer's representation of insurer suing a corporation whose parent and sister company had been formerly represented by the lawyer is improper where it was clear that an adverse judgment would affect the parent's "bottom line"); See In re Jones & McClain, LLP., 271 B.R. 473 (Bankr.W.D. Pa. 2001) (lawyer's representation of law firm partner who filed involuntary bankruptcy against his law firm would be materially adverse to the lawyer's former client, the law firm).

[33] See e.g., Rhode Island Ethics Op. 2005-2 (2005) (lawyer's consultation with property owners concerning objection to municipality's plan to permanently close nearby landfill, and possible groundwater problems in the area of the landfill, are not substantially related to municipality's plan to place a facility on a lot adjacent to the landfill, and accordingly lawyer is not prohibited from representing municipality in dispute with property owners who object to the facility); Pennsylvania Bar Assoc. Ethics Op. 2017-001 (January 7, 2017)(lawyer who represented husband and wife in real estate purchase may represent husband in subsequent divorce where the divorce is not the same or related matter and the joint representation did not reveal any information about the wife that was not already known to the husband).

[34] See US v. Prevezon Holdings, Ltd., 2nd Cir. No. 16-132-cv (October 17, 2016) (law firm disqualified from representing criminal defendants accused of money laundering scheme where law firm performed investigation of alleged fraud for company that was victim of the fraud, but not a party or witness in criminal action).

Two examples of matters that may be substantially related in the immigration context are as follows:

1. In a consultation concerning representation of permanent resident husband in immigration court proceedings involving deportation based on criminal conviction, the prospective husband client discloses that he has abused his undocumented wife. The husband does not retain the lawyer. Later, the undocumented wife consults with the same lawyer seeking any immigration relief available. One option for her would be a VAWA case, but these two matters are substantially related because of the confidential information.
2. In a consultation concerning representation in obtaining employment based-permanent residency through the lawyer's current employer client, the prospective beneficiary client discloses that she engaged in unauthorized employment during her F-1 student status, and she insists that the lawyer not disclose that status violation to the employer. The information provided by the prospective client is substantially related to the lawyer's representation of the employer.

Significantly Harmful

MR 1.18(b) also limits the circumstances under which a disqualifying conflict may occur in prospective client conflicts by requiring that the information at issue must also be "significantly harmful" to the prospective client.

As noted, prospective clients are entitled to some, but not all, of the protections afforded current or former clients. Under MR 1.18(b), the lawyer may only be disqualified from the representation in the same or substantially related matter where the interests of the affected persons/clients are materially adverse if disclosure or use of confidential information "could be significantly harmful" to the prospective client.[35] This differs from MR 1.9(a) under which the disqualification applies whether or not the lawyer received any confidential information, harmful or otherwise from the former client.

MR 1.18 does not define the phrase "significantly harmful" and it is not defined in MR 1.0. The meaning of the phrase was clarified in at least one state bar's ethics opinion that surveyed case law after MR 1.18 was adopted.[36] The opinion listed examples of significantly harmful client information as contemplated by the rule. The examples, which are instructive, include:

- Sensitive personal information from the prospective client.[37]
- Premature possession of the prospective client's financial information.[38]
- The prospective client's settlement position.[39]
- The prospective client's litigation strategies.[40]

[35] See Comment 6 to MR 1.18.

[36] Wisconsin Formal Ethics Op. EF-10-03 (2010) ("Information may be 'significantly harmful' if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies, or potential weaknesses. "Significantly harmful" may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impressions about the facts of the case; or information that is extensive, critical, or of significant use.").

[37] Sturdivant v. Sturdivant, 367 Ark. 514, 241 S.W.3d 740 (2006) (where in custody proceeding, prospective client gave the lawyer a copy of his journal, told the lawyer facts that were not in the journal, and disclosed his concerns about the children and his former wife, information deemed "significantly harmful").

[38] Such information could have a substantial impact on settlement proposals and trial strategy and therefore be significantly harmful. See e.g., Artificial Nail Technologies, Inc. v. Flowering Scents, LLC, 2006 WL 2252237(D. Utah) (unpublished opinion).

[39] Id.

A North Dakota disciplinary decision, which cited to the above factors, helps clarify the circumstances under which disclosure of information received from the client may be deemed significantly harmful for purposes of MR 1.18.[41] In the scenario considered, the lawyer discussed a potentially lucrative transaction with a prospective client during a consultation. The prospective client had researched a decedent's ownership of valuable mineral rights with the intention of obtaining a finder's fee from the heirs. The lawyer revealed that information to a current client who had an existing interest in the matter. The lawyer then represented the current client in taking action to obtain the mineral rights using the information provided by the prospective client. In defending the motion to disqualify, the lawyer argued that the information was not "significantly harmful" because it had been publicly available. While agreeing that publicly available records are generally not considered confidential and therefore could be used against a former client, the court found that the information was "sensitive" information under MR 1.18 because the prospective client had devoted more than "300 hours searching public records for a piece of a puzzle" for his own benefit. Unauthorized use by the lawyer of that information to assist an existing client was deemed significantly harmful. Notably the court also rejected the lawyer's attempt to invoke the exception under North Dakota's version of MR 1.18, which would have permitted the representation if the lawyer had employed "reasonable measures to avoid exposure to more significantly harmful information than was reasonably necessary to determine whether to represent the prospective client and notice [was] promptly given to the prospective client [under N.D. Rule 1.18(d)(2)]." Notably, the court observed that the lawyer did not take such steps because he was motivated in part by his pecuniary interest in receiving the finder's fee.[42]

In another North Dakota disciplinary decision, the court opined that the determination of what constitutes "significantly harmful information…[is] exquisitely fact-sensitive and specific." In that case, the lawyer originally had been admonished for violating both Rule 1.7 and Rule 1.9, i.e., using confidential information obtained from a "former client" in the representation of another "current client." However, the reviewing court concluded that no lawyer-client relationship had been established as charged and accordingly Rules 1.7 and 1.9 did not apply. On the basis that there was only a prospective client relationship, the court looked to N.D. Rule 1.18 to determine if the lawyer had received significantly harmful information from the prospective client. Based on the evidence, which included the lawyer's notes, the court concluded that the lawyer had received only "general information [concerning., e.g., the procedural history of the matter] that [the lawyer] would have received in the ordinary course of due diligence."[43]

In a recent Oregon decision involving disqualification under Oregon's Rule 1.18 (almost identical to MR 1.18), the court took what might be described as a "you know it when you see it" approach in determining that the lawyer had not received disqualifying information.[44] The suit concerned a creditor's automobile repossession and was brought by the debtor against a credit union. Among the causes of action in the suit was the intentional infliction of emotional harm.

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[40] A prospective client's personal thoughts and impressions regarding the facts of the case and possible litigation strategies may be significantly harmful. See e.g., Chemcraft Holdings Corp. v. Shayban, 2006 WL 2839255 (N.C. Super) (unpublished opinion).

[41] See Disciplinary Board v. Carpenter, 2015 ND 111, 863 N.W.2d 223 (May 1, 2015) (three-month suspension for violating N.D. Rule 1.18).

[42] See also Zalewski v. Shelroc Homes, LLC, (N.D.N.Y. Mar. 6, 2012) (applying New York Rule 1.18, court disqualified lawyer from representing plaintiff in lawsuit against prospective client who disclosed to lawyer its views on certain settlement issues, including price and timing, which could provide "unfair advantage" and "ultimately control the great stakes [at issue].")

[43] Kuntz v Disc. Bd. N.D. 2015 ND 220, 869 N.W.2d 117 (August 26, 2015); see also Mayers v. Stone Castle Partners, LLC, 1 N.Y.S.3d 58, 2015 N.Y. Slip Op. 00295 (2015) (no basis for prospective client disqualification where information disclosed to lawyer, although not public was already known to current client's adversary).

[44] Jimenez v. Rivermark Cmty. Credit Union, D. Or. No. 3:15-CV-00128-BR (May 12, 2015).

The debtor had moved to disqualify the lawyer representing the creditor on the basis that her husband had called the lawyer naming the credit company, the lawyer's current client, and alleging responsibility for harm. The husband alleged he had told the lawyer that "punches may have been thrown" by the creditor's agents during the course of the repossession and that the debtor's child who witnessed the altercation "may have felt endangered." Without articulated analysis, the court held that the information was "not the kind of disqualifying information" referred to in Rule 1.18. The court went on to state that even if the information were disqualifying, the law firm was still entitled to the exception provided in Rule 1.18(d), because the firm took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client. There, the lawyer made clear to the debtor's husband that the firm does not generally take cases like the one the husband described, in part because the firm frequently represents creditors. As soon as the lawyer taking the call learned the name of the creditor, the lawyer realized there was a conflict, told the husband that the firm had a conflict, and declined representation.[45]

Prong Two of MR 1.18(c): Prospective Client Conflict of One Lawyer May Bar Representation by Another Lawyer in the Same Firm

Prong two of MR 1.18(c) tracks the imputation of conflicts language in MR 1.10(a)(1) that bars another lawyer "in a firm with which the [disqualified] lawyer is associated" from undertaking or continuing the representation burdened by the conflict.[46] MR 1.18(c) also incorporates the "screening" exception of MR 1.10(a)(2) pertaining to former client conflicts where the conflicted lawyer has moved to another firm and the firm employs specific requirements itemized in the rule. Under MR 1.10(a)(2) a former client conflict will not be imputed to the new firm if (1) the conflicted lawyer is "screened" from participation in the matter, (2) the former client receives timely notice of the representation and (3) the firm provides certification of the screening procedures when requested by the former client.[47] As noted in MR 1.18(c), with respect to prospective client conflicts, the conflicted lawyer may avoid disqualification on similar grounds to former clients but with one additional caveat. MR 1.18(d), requires that the disqualified lawyer must have taken steps to limit the nature and scope of information provided by the prospective client. We discuss MR 1.18(d) in detail below.

MR 1.18(d)

MR 1.18(d) provides that "When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if one of two exceptions is met, the second of which is unique to prospective clients.

[45] Id.

[46] See Comment 7 to MR 1.18.

[47] MR 1.10(a)(2) provides in pertinent part that a firm to which a conflicted lawyer has moved may still represent a current client in a matter burdened by a former client conflict if:

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

MR 1.18(d)(1)

MR 1.18(d)(1) provides that "When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:

"both the affected client and the prospective client have given informed consent, confirmed in writing…"

When There is Informed Consent Confirmed in Writing

As in the case of current and former client conflicts, a lawyer is permitted to proceed with a conflicted representation if the lawyer obtains the "informed consent" of the affected client (former or current) and the prospective client. However, as reflected in Comment 6, the circumstances under which consent is permissible is governed by MR 1.7.[48] Under MR 1.7(b), a lawyer may *never* engage in a conflicted representation that is prohibited by law and under MR 1.7(c) a lawyer may *never* engage in a conflicted representation based on "the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal."[49]

Notably, Comment 5 to MR 1.18 allows a lawyer to condition conversations with a prospective client on the person's informed consent that information disclosed during the consultation will not prohibit the lawyer from representing a different client in the matter. And, if the agreement so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.[50]

Although lawyers practicing in any discipline must always take all reasonable steps to insure compliance with consent requirements, the requirement to obtain a client's informed consent to a conflict confirmed in writing is particularly important to immigration lawyers who often represent multiple clients in employment and family-based matters.[51] Because of its importance, we address informed consent to prospective client conflicts in further detail with reference to former or current clients as well.

Informed Consent to Prospective Client Conflicts of Interest

Consent to a prospective client conflict alone will not satisfy MR 1.18 if the consent is not informed. As discussed, "informed consent" is defined in MR 1.0(e) as referring to "an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." What constitutes adequate information about a conflict of interest varies from case to case and whether the conflict is deemed consentable or "waivable" in the first instance. As noted in MR 1.7(b) and (c), a lawyer may never engage in a conflicted representation that is prohibited by law or one involving clients who are directly adverse in litigation. Conversely, as noted in Comment 28 to MR 1.7, in transactional non-litigation matters, although a lawyer may not represent multiple parties whose interests are fundamentally antagonistic to each other, "common representation is

[48] See Comment 6 to MR 1.18 which provides in pertinent part that if "the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation."

[49] See MR 1.7.

[50] Comment 5 to MR 1.18 provides as follows:

A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

[51] For a comprehensive discussion of current client conflicts, including dual representation, lawyers should review EC for MR 1.7 at 6-1 (pg. 204).

permissible where the clients are generally aligned in interest even though there is some difference in interest among them."[52] In deciding the type and extent of information about the conflict to be disclosed, the lawyer should consider the consenting person's experience in legal matters generally and experience in making decisions or whether the client or other person is independently represented by other counsel in giving the consent, in particular when consent involves waiver of the duty of confidentiality.[53]

It bears repeating that the concept of informed consent interacts with the question of consentability in the first instance. Before a lawyer seeks a waiver, the lawyer must have a *reasonable belief* that he can fulfill his duty of loyalty to multiple clients which includes full disclosure of information necessary for "informed consent." The lawyer must do more than just advise the affected clients that there is a conflict and then ask for consent.

In the context of a non-immigration current conflict of interest, a North Carolina lawyer was disciplined expressly because the waiver of a conflict he obtained from the seller and buyer in a complex commercial real estate transaction was inadequate. The waiver stated only that "the parties have been advised that there is a potential conflict of interest among their individual interests."[54] The court found that without providing the affected parties with specific information identifying the types of conflicts that could occur, the buyer's consent could not be deemed informed. The underlying facts showed that the lawyer was privy to seller's information which as counsel for the buyer he had a duty to disclose and which he failed to disclose.

The court's decision makes clear that informed consent as expressed in applicable conflict of interest rules, here MR 1.18, as well as MR 1.7 and MR 1.9, cannot be achieved unless the lawyer fulfills his obligation to keep the current, former or prospective client fully informed of all matters that impact the representation. *Immigration lawyers must also be mindful of factors that might interfere with basic communication, such as the client's (prospective, current or former) first language, educational level and the prior experience with lawyers or legal matters.*[55]

If the only way that a lawyer can provide sufficient information about the nature of the conflict would be to disclose the other affected client's confidential information, then as a practical matter the lawyer will not be able to obtain that client's informed consent to the conflict and would be precluded under MR 1.7 from going forward with the representation of either client. This reasoning applies to MR 1.18 as well.

Confirmed in Writing

When there is a conflict, as reflected in MR 1.18, MR 1.7, and MR 1.9, consent must not only be informed, but also confirmed in writing. Orally advising the affected client about the conflict without documenting the client's confirmation will not suffice.[56] Although not specifically expressed in the applicable conflict of interest

[52] See Comment 28 to MR 1.7. (In seeking informed consent, the "lawyer [may seek] to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.)

[53] See Comment 6 to MR 1.6.

[54] N.C. State Bar v. Merrill, N.C. App., No. COA14-1334 (October 6, 2015) (lawyer suspended for two years for violating Rule 1.7's prohibition against conflict of interest and Rule 1.15-2(a)'s duty to safeguard client funds).

[55] The concept of informed consent is essential to a number of other Model Rules which address conflicts, among them MR 1.6 (confidentiality), MR 1.7 (current client conflicts), MR 1.9 (former client conflicts), and even MR 1.14 (diminished capacity). For a more detailed discussion on informed consent, immigration lawyers should review AILA's EC for MR 1.6 at 5-1 (pg. 139) and MR 1.14 at 11-1 (pg. 265).

[56] See, e.g., Iowa Sup. Ct. Disciplinary Bd. v. Stoller, Iowa, No. 15-1824 (May 13, 2016) (lawyer who had been disqualified for failing to obtain informed consent confirmed in writing was also suspended based on representation of one client whose position was directly adverse to other clients who he represented in small claims court and where lawyer notified the small

rules, best practice would be for the writing to reflect the lawyer's full discussion of the conflict with the affected clients in order to support the conclusion that the consent was informed.[57] Where the written agreement does not include the appropriate degree of specificity, the client may later claim that the lawyer did not provide sufficient facts and explanations to render the consent informed and the consent may not be deemed enforceable.

Obtaining informed consent in immigration matters is particularly problematical if the client is not fluent in English or lacks sufficient educational background or understanding of the United States legal system. In the case of minors and those deemed otherwise impaired, under MR 1.14 lawyers have special responsibilities in the representation, which also include obtaining informed consent to conflicts between guardians and their wards, for example.[58] Where English is not the first language of the affected clients, the prudent and conscientious immigration lawyer should take steps to evidence appropriate communication by drafting the written consent confirmation in the affected clients first language or using the services of an independent interpreter to confirm that the terms of the written consent were communicated in the appropriate language and understood.

MR 1.18(d)(2)

MR 1.18(d)(2) provides that "When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:"

"the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.

When There is No Informed Consent and Conflict is Imputed

As discussed in Comment 7 to MR 1.18, a lawyer's prospective client conflict may be imputed to other lawyers in the same law firm as provided in MR 1.10 (imputation of conflicts). Under MR 1.18(d)(2), disqualification by imputation may be avoided only (1) if the disqualified lawyer took reasonable measures to avoid receipt of more disqualifying information than was reasonably necessary to assist the lawyer in determining whether to represent the prospective client *and* (2) the disqualified lawyer is timely screened, received no portion of the fee charged and the prospective client is promptly given notice.[59] As reflected in Comment 8 to MR 1.18,

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claims court clients in an email in which he also severed his relationship; in a second matter lawyer represented landlord and tenant in a lease transaction and did not seek a conflict waiver until well after he began the conflicting representation).

[57] See Comment 20 to MR 1.7 (In large part, the "writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.").

[58] For a comprehensive discussion about representing the impaired clients, see EC for MR 1.14 at 11-1 (pg. 265).

[59] See MR 1.0(k) (definition of screening) and MR 1.10 (2) (on imputation) which permits other lawyers in the same firm as the disqualified lawyer to overcome imputation of a former client conflict as described in MR 1.9(a) or (b) if:

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

notice should include a general description of the subject matter of the conflict, the screening procedures employed and generally should be given as soon as practicable after the need for screening becomes apparent.

It is important to remember that the terms "reasonable" and "reasonably" used in the contexts of the steps taken by a lawyer to limit receipt of disqualifying information from a prospective client may vary depending on the nature of the practice and the specifics of the matter itself. Immigration lawyers often field calls from prospective clients. Those who do not immediately advise the caller about the consequences of receiving confidential information run a substantial risk of hearing more information than necessary to determine if there are conflicts or other obstacles to the representation. The lawyer may be subject to the same risks even after a preliminary conflict check if the lawyer agrees to discuss the matter in a consultation setting and receives confidential information.

Special Areas of Concerns

Inadvertent Creation of Prospective Clients Through Use of a Professional Website or Participation in Chatrooms or Listservs[60]

Websites

An inadvertent prospective client lawyer relationship may be created based on the lawyer's interaction with someone about representation resulting from a "visit" to the lawyer's website. Unlike an unsolicited telephone call from a person seeking representation, in which the lawyer may screen the call or otherwise exercise control over the nature and amount of information provided, a lawyer may have no control over information that a website visitor chooses to disclose in an unsolicited email via the lawyer's website. Essentially, as soon as the lawyer opens the e-mail, the lawyer has received the information and may then be under a duty to keep the information confidential.

When a website is silent or even ambiguous as to how the lawyer will handle online inquiries or other communications from a visitor, the lawyer is at risk that the visitor may reasonably believe that any communication which includes confidential information to the lawyer sent via the website will be kept confidential in the same manner as confidential information discussed in a face to face meeting with the lawyer is treated. A lawyer should clarify any ambiguity created by the use of a website for marketing purposes by providing a disclaimer in the website limiting the lawyer's obligations regarding treatment of confidential information.

Some lawyers may seek to avoid such problems by including a disclaimer on the website. However, if the disclaimer is not clear and unambiguous or otherwise understandable to an unsophisticated lay person, it may not be sufficient to relieve the lawyer from the obligation to maintain the confidentiality of the information submitted.

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

[60] A lawyer-client relationship may also be created inadvertently if the lawyer provides legal advice and the prospective client has a reasonable basis to believe that the lawyer has agreed to the representation. The model rules do not define the phrase "lawyer-client relationship," but under common law a lawyer-client relationship which triggers the lawyer's ethical obligations to the client, including the duty of confidentiality, is formed when the client reasonably believes the lawyer is representing his interests and/or providing him with legal guidance. The client does not have to pay the lawyer any fees; the lawyer does not have had to spend extensive time with the client; and, the client does not have to sign a written agreement to employ the lawyer. Simply put, a lawyer-client relationship may be inferred from the circumstances. If a person comes to the lawyer for legal advice through any medium and in any setting, showing a desire, express or implied, for representation, and reasonably believes he is getting legal advice from the lawyer, a lawyer-client relationship will be established.

At least one way of demonstrating that such disclaimers are read and understood by the visitor would be to condition any email communication via the website to a "click check" that the visitor agreed to the terms of the disclaimer. When a website specifically invites submission of information by those seeking representation, through for example, an electronic form which asks the client for information about the matter at issue, it is more likely that the visitor will be deemed a prospective client subject to the protections under MR 1.18. If the form asks for only the visitor's contact information, whether such procedures will trigger confidentiality obligations under MR 1.18 will depend on how the lawyer responds. If the lawyer asks the visitor to provide additional information relevant to the legal matter, without, again, advising the visitor about how the information will be treated, it is more likely that the visitor will be deemed a prospective client subject to the protections afforded under MR 1.18.[61]

Because the number of visitors to a lawyer's website will likely far exceed other forms of interaction, lawyers who are in doubt about disclaimers posted on their websites should consider consulting with a professional responsibility lawyer or seek assistance from local bar associations for recommended disclaimer language, at a minimum.[62]

Chatrooms or Listservs

When a lawyer provides legal advice pertaining to facts disclosed by the visitor to a chatroom or the questioner on a listserv, an inadvertent prospective client relationship—or as discussed above, even a lawyer-client relationship—may be created. Such relationships trigger the lawyer's duty of confidentiality. They may also create an impermissible conflict of interest if the lawyer is currently representing or has previously represented a participant's adversary.

The use of a disclaimer stating that no lawyer-client relationship or prospective client relationship will be created by the interaction will be effective only if it is reasonably understandable, properly placed and not misleading in that it fully explains the limitations applicable to the interaction. However, since a chat room or listserv, by definition, involves interaction between the lawyer and others, a lawyer's disclaimer may be rendered void if the lawyer's responsive communications or other acts are inconsistent with the disclaimer. The lawyer may not realize that a lawyer-client relationship or prospective client relationship has been created when the lawyer discusses details of a client's matter on-line. While that scenario may seem implausible, the prudent and conscientious lawyer must exercise the greatest restraint before clicking the send button on certain social media applications.

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[61] Although Texas has not adopted a version of MR 1.18, a 2015 Texas Bar opinion concerning a lawyer's duty to a prospective client who responds to a law firm website provides advice which is consistent with MR 1.18. See Texas Center for Legal Ethics and Practice Op. 651(where website solicits email communication from potential client without effective warnings concerning confidentiality, law firm's lawyers may be required to treat information received as confidential and not available for use against the person transmitting the information).

[62] For example, in Texas Bar Op. 651, discussed in note 64 above, the committee determined that the following website disclaimer was an effective warning statement as to how information provided in an email communication from a potential client would be treated, which would relieve the firm from the obligation to protect or refrain from using information received through email generated by the web site's link:

Warning: Do not send or include any information in any email generated through this web site if you consider the information confidential or privileged. By submitting information by email or other communication in response to this web site, you agree that the communication does not create a lawyer-client relationship between you and the law firm and its lawyers and that any information submitted is not confidential and is not privileged. You further acknowledge that, unless the law firm subsequently enters into a lawyer-client relationship with you, any information you provide will not be treated as confidential and any such information may be used adversely to you and for the benefit of current or future clients of the law firm.

Inadvertent Creation of a Prospective Client Relationship Through Presentations in Beauty Contests, in Response for Requests for Proposals (RFP) or Other Presentations, Such as Those to Community or Religious-based Groups

Beauty Contests

The phrase "Beauty Contest" is used to describe a common marketing tool in which members or associates of a law firm present their credentials and fee structure in person to a potential client in hopes of being retained by that client. The practice is not a prohibited solicitation because such presentations occur in response to formal requests for proposals (RFP) from potential clients to handle particular legal matters.[63] For example, a business immigration law firm may be asked to respond to a RFP from a large corporation or governmental entity. Generally, the RFP may ask questions about the firm's capabilities and fees for different non-immigrant visa applications that authorize employment and applications for employment-based permanent residence. Under those circumstances, the potential client who made the RFP would be deemed a prospective client.

In the true Beauty Contest setting, the RFP would not normally share confidential information, but it is possible that an individual attendee could approach the lawyer to engage in a private conversation in which the attendee might share confidential information.

A recent New York bar opinion addressing beauty contests discussed three basic scenarios that would implicate MR 1.18. They are not only relevant to Beauty Contests but to other interactions between a lawyer and a prospective client.[64] In one scenario, Company A wants to bring an action against Company B. Company A requests several firms to present its qualifications, among them Firm X, but Company A does not provide any confidential information about the nature of the lawsuit. Company A decides not to retain Firm X, but Company B decides to hire Firm X to represent it as defendants in the suit commenced by Company A. The opinion concluded that because Firm X received no confidential information, it was not subject to the restrictions of MR 1.18(b) and would not be barred from representing Company B under MR 1.18(c). If the firm received no confidential information, by definition it could not be "significantly harmful." The opinion states that information that is publicly available presumably is already known by Company B.

In the second scenario, Company A provides specific information to certain Firm X lawyers about the underlying facts and legal theories about the proposed lawsuit. Because Company A provided confidential information to the lawyers who participated in the Beauty Contest, they would be subject to the restrictions imposed under MR 1.18(b) unless one of the exceptions under MR 1.18(c) applied. Lawyer from Firm X could proceed with the representation of Company B only if Company A gave its informed consent, or, if consent was not obtained, if the information obtained could not be significantly harmful to Company B. If the information was significantly harmful, the conflict of interest would disqualify Firm X unless it took steps to implement the appropriate screening procedures set forth in MR 1.18(c), a question of fact.

The third scenario discussed in the opinion involved a transactional matter in which Company A wants to acquire Company C. Firm X is asked to present its credentials to Company A, which provides confidential information to certain Firm X lawyers. Company A decides not to hire Firm X, but Company B engages Firm X to represent it in its own efforts to acquire Company C. The opinion explains that the analysis may involve different factual considerations from those pertaining to litigation, i.e., whether the information would be

[63] See MR 7.3 governing contacts with prospective clients.

[64] NYC Bar Op. 2013-01, http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2013-01-duties-to-prospective-clients-after-beauty-contests-and-other-preliminary-meetings.

significantly harmful to Company A in the bidding process and whether Company A's interests are materially adverse to Company B as it relates to the transactions. Consideration of the third scenario makes clear the importance of the criteria set forth in MR 1.18. In the immigration non-litigation context, it would be rare for the "significantly harmful" test to be triggered under 1.18(c) if a firm represents another competitor company.

In the immigration context, lawyers might gain confidential information from prospective client companies during a Beauty Contest that would later create problems for future representation. For example, a company reveals labor condition application (LCA) violations during its presentation but does not hire the firm. Later, employees of that company wish to hire the firm to file complaints with the Department of Labor (DOL) regarding the LCA violations. The company would be owed the protections of a prospective client making representation of the employees difficult because it would involve a substantially related matter, the interests of the employees are materially adverse to the company, and the information received from the company during the Beauty Contest could be significantly harmful. The only way the representation could proceed is if both the employer and the employees provided informed consent that is confirmed in writing[65] or if the screening procedures described in MR 1.18(d)(2) were used.

In-Person Pro-Bono Presentations to Religious Groups or Other Non-profit Organizations

Sometimes, immigration lawyers are invited to speak at a place of worship or community center to provide general information about immigration issues, in particular, obtaining permanent residency. While such presentations provide a public service, they also provide the immigration lawyer with the opportunity to deal with "prospective clients" as defined in MR 1.18. Members of the audience may approach the lawyer directly, revealing otherwise confidential information to the lawyer. Others may elect to pose a question based on the person's own situation in the presence of other attendees. A lawyer may be tempted to answer the question as it pertains to the specific attendee, rather than answering the question generally by explaining the applicable law and refraining from providing specific advice. In such situations, the prudent and conscientious immigration lawyer should explain at the outset that the lawyer will be providing only general information and that attendees should refrain from revealing confidential information in a public setting or to the lawyer at the event. Some kind of warning should also be given before people are allowed to ask questions. The analysis provided above as to "beauty contests" also applies to interactions with attendees at such presentations.[66]

On-line For-profit Legal Marketing Services

Lawyers who participate in for-profit on-line marketing services, such as AVVO, which provide assistance to potential clients in hiring lawyers, must consider not only the application of MR 1.18, but all professional responsibility rules. MR 1.18 is relevant because in some cases potential clients are offered the opportunity to pose specific legal questions on-line, albeit anonymously, to a lawyer who then provides an answer to the

[65] See MR 1.18(d)(1).

[66] Lawyers who actually provide limited legal services on a pro bono basis through a non-profit organization or court should be mindful of MR 6.5 ("Nonprofit & Court-Annexed Limited Legal Services Programs Public Service") which addresses limited representation in a pro bono setting. MR 6.5 provides that lawyers who provide short-term limited legal representation are subject to the requirement of MR 1.7 (current clients conflicts and MR 1.9(a) (former client conflicts) *only* if the lawyer *knows* that the representation involves a conflict. Similarly, imputation of a conflict and disqualification (MR 1.10) will *only* apply if the subject lawyer *knows* that another lawyer associated with the lawyer in a firm is disqualified. *As always, lawyers should check the applicable state version of all ABA professional responsibility rules, including MR 6.5.*

question. Although such programs often contain general disclaimers—and those provided by the lawyers to the effect that no client-relationship is being established and that the answers do not constitute legal advice as a matter of law—such disclaimers may not provide absolute protection to the lawyer from malpractice claims or violation of professional responsibility rules. Notably, much of the commentary concerning potential ethical issues for lawyers participating in programs like AVVO has focused on issues relating to fee sharing and improper referral fees.[67] A comprehensive analysis of the ethical issues posed by such services is beyond the scope of this report. However, it would be wise to consider the basic principles and obligations under MR 1.18 discussed in this EC to avoid the inadvertent creation of a "prospective client" relationship with an individual. This is an area in which the conscientious and prudent lawyer should proceed gingerly. Lawyers wishing to learn more should review the ABA Model Rules of Professional Responsibility in addition to their state's Rules of Professional Responsibility, ethics opinions and other legal publications.[68]

D. Hypotheticals

Caveat: The information in this section reflects the views of the Reporter and the AILA Ethics Committee and is not intended to constitute legal advice.

Hypothetical One: Online Questionnaires for Prospective Clients

Smith is a partner at a boutique immigration firm. During his time with the firm he has never declined or withdrawn from a representation because of a conflict. He recently updated the firm's website to make it as easy as possible for those seeking legal services to request a consultation. On each page of his website he includes a large red button above a notation that reads "Click Here to Schedule a Consultation." On the page linked to the red "consultation" button, there is an online questionnaire to complete. The questionnaire requests the person's full contact information, marital status and the names of a spouse and children, if any, the person's immigration status and other information in narrative form that the person deems relevant to the inquiry. Once the person seeking the consultation submits the completed questionnaire, the person must then pay online for the consultation via credit card. The person is then directed to a calendar to select an available date and time for the consultation. Once the appointment process has been completed on-line, the firm immediately emails a boiler-plate confirmation and "non-engagement" letter which includes the following language:

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[67] See, e.g., New York State Bar Ass'n Op. 1131 available at http://www.nysba.org/EthicsOpinion1132/. The opinion which addresses only New York rules 1.0(a), 5.4(a), 7.1(a), 7.1(b)(1), 7.1(f). 7.1(h), 7.2(a) concludes that a "lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a)."

[68] See, e.g., Merrill Hodnefield, JD, "Can Using Avvo Violate Your Bar's Ethics Rules", September 15, 2017 available at https://www.themodernfirm.com/blog/qotw/can-using-avvo-violate-bars-ethics-rules. This article addresses only improper fee-splitting and referral fee issues and cites to recent bar opinions in New York, New Jersey, Ohio and Pennsylvania addressing on that subject. Immigration lawyers are advised to review AILA's publication entitled "Navigating the Social Network: Applying Ethics Rules to Blogs, Facebook, Twitter and Other Social Media, *Carole A. Levitt, Mark E. Rosch, and Alan B. Goldfarb published [in the AILA Annual Handbook (May 15, 2012) available at* http://www.aila.org/practice/management/technology/navigating-the-social-network-applying-ethics-rule, Catherine J.Lanctot, *DUKE LAW JOURNAL* [Vol. 49:147, 244],"Attorney-Client Relationships in Cyberspace: the Peril and the Promise."

No attorney-client relationship is established unless the lawyer provides an engagement letter signed by the lawyer agreeing to undertake the representation.

After the confirmation letter is sent, Smith conducts a conflict check using software designed for that purpose. The software requires only entry of the name and address of the potential client and any family members.

Nina visits Smith's website. She completes the questionnaire, pays the fee, and schedules an appointment for a date a week away. In the narrative information section of the questionnaire, Nina states that she is worried because she provided a fake green card to obtain employment at her current employer, Bob's Expensive Furniture (Bob's) as well as her previous employer, McDowell's Lighting Supply (McDowell's). Smith does not run the conflict check until the morning of the appointment; based solely on the names submitted, no conflict is shown. Smith then reads the entire questionnaire (several pages long) and learns about the fake green card issue. Smith becomes very upset because he realizes that Nina has not only provided damaging information that may affect any remedies available to her, but also information that shows that one of her employers is Bob's, a current client that Smith is representing in an I-9 investigation. Smith immediately directs his receptionist to advise Nina when she arrives that he is unable to represent her, or even meet with her, and that he will issue a refund to her credit card. Three days later, the president of McDowell's consults with Smith, hoping to hire him to handle 10 H-1B cases for the company.

Analysis

Do the interactions between Smith and Nina meet the requirements for deeming Nina a prospective or current client?

In order to determine Smith's ethical obligations to Nina, Smith must first determine whether Nina would be deemed a prospective client or a current client. (There is nothing to suggest that Nina is a former client.) Since there was no necessary meeting of the minds (express or implied) as to a substantive lawyer-client relationship between Nina and Smith, Nina would not be deemed a current client. Smith offered no legal advice to Nina concerning her immigration status in any internet interaction or in person. Information flowed only from Nina to Smith in the questionnaire she submitted via Smith's firm's website. Smith did not meet with Nina or otherwise have contact with her, gave no explanation as to why he could not represent her and did not therefore lead Nina to believe he was her lawyer. Smith's disclaimer that no lawyer-client relationship would be established absent a signed letter from Smith so stating would not be dispositive of whether a client-lawyer relationship had been established since a client-lawyer relationship may be implied without a formal agreement and may established without payment of any fee. The disclaimer would be relevant in deciding whether Nina is deemed to be a client. Her reliance on Smith's conduct or advice must be reasonable to create an implied lawyer-client relationship under common law.

Nina would be deemed a prospective client based on the definition provided in MR 1.18. Nina is a "person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter." Here Nina clearly reached out to Smith in response to information provided on his firm's website and completed the questionnaire required in order to schedule an appointment for a consultation. It is not unsolicited information; Smith has invited her to provide the information, and he has taken no steps to explain how the information provided in the questionnaire will be treated for purposes of confidentiality. At a minimum, the failure to provide such a disclaimer increases the risk that Smith will be collecting more confidential information than is reasonably necessary to determine if there is a conflict. Smith's after the fact disclaimer in the "non-engagement" letter will not excuse him from the obligation to maintain the confidentiality of information provided in the questionnaire; nor will it excuse the consequences of any conflict of interest that may arise.

If Nina is a "prospective" client as defined in MR 1.18, what are Smith's obligations to Nina?

Once Nina is deemed a prospective client, MR 1.18 triggers Smith's obligation to maintain the confidentiality of information she provided in connection with the possibility of forming a client-lawyer relationship with Smith. He cannot "disclose" the information in connection with representation of a current or former client in a matter that is the "same or substantially related" and where the interests of the current or former client are "materially adverse" to those of the prospective client. He also cannot use the information, even if he does not disclose it, if such use would be to Nina's detriment. Smith's cancellation of the in-person appointment with Nina does not excuse his obligation to maintain the confidentiality of the information she has already provided him. The cancellation might reduce the risk that Nina could maintain that she had already established a lawyer client relationship with him via the internet. Because Smith did not provide any legal advice to Nina or otherwise provide legal services there really is no credible basis to support a lawyer-client relationship. Smith did not have to cancel the appointment; he still could have met with her and explained that he could not represent her because of a conflict of interest, without providing legal advice.

Does a conflict of interest arise because of Smith's obligations to Nina, as a prospective client, and Smith's obligations to Bob's, as a current client?

Most likely no. As a current client, Bob's is owed the protections of MR 1.7, which incorporates the duty of loyalty. As a prospective client, Nina is owed the protections of MR 1.18. A lawyer cannot represent someone whose interests are (1) materially adverse (2) in the same or substantially related matter (3) if the lawyer received information from the prospective client that could be significantly harmful to her. This is a somewhat lower standard of protection from what is owed to a former client. As discussed below, it is a close question whether a conflict arises in connection with Smith's representation of Bob in the I-9 obligation.

Bob's I-9 obligation was only to verify that the documents Nina presented when hired appeared to be genuine. In fact, the Immigration and Nationality Act prohibits employers from discriminating against individuals based on their citizenship or immigration status, or based on their national origin, in the I-9 employment eligibility verification process. Employers must accept any document an employee presents from the I-9 Lists of Acceptable Documents as long as the document reasonably appears to be genuine and to relate to the employee. Document abuse in rejecting documents that appear to be genuine and relate to the employee is prohibited discrimination. Bob's, as the employer, is not expected to be a document expert. Bob's would not incur liability during the I-9 investigation if it did not knowingly hire Nina or continue her employment after discovering that she was not authorized to work. If Bob's were notified that Nina may have used false documents through a notice of suspect documents or otherwise, and therefore was not authorized to work, the company would need to take action in response. Based on the facts provided, it could be argued that Smith has no disqualifying conflict of interest in this case.

If a conflict of interest develops,[69] how may Smith resolve it?

Absent Nina's informed consent to disclose the information about her fake ID to Bob's, Smith would be faced with an irresolvable conflict requiring him to withdraw from representing Bob's. Thus, he would lose a corporate client facing an I-9 investigation over a prospective client who paid Smith nothing.

Does a conflict of interest arise because of Smith's obligations to Nina, as a prospective client, and Mc Dowell's, if Smith determines to represent the company in H-1B matters?

No. Representing McDowell's in H-1B matters would not present a conflict since the H-1B matters are not the same or substantially related to Nina's use of a fake green card to obtain employment with Mc Dowell's in the

[69] For example, if Bob's finds itself in a position to negotiate a lower penalty during the I-9 investigation by providing evidence of cooperation, including that Nina had used false documents.

past or any efforts she would make to achieve permanent residency through a non-employment related remedy. Smith could fulfill his obligation to maintain the confidentiality of Nina's fake green card information and provide McDowell's with the required competent and diligent representation for H-1B work without any material impairment. Of course, if, by chance, McDowell's agrees to sponsor Nina, Smith would likely be obligated to disclose that information as it would be relevant to that H-1B matter. If so, Smith would again need to obtain Nina's informed consent to disclosure. However, as a practical matter, Nina would not likely ask McDowell's to support an H-1B petition for temporary status on her behalf if she had already presented evidence on the earlier I-9 that she was a permanent resident. If she made this request, McDowell's would then know she had misrepresented her permanent resident status on that I-9. If McDowell's agreed to support an H-1B petition, there would be no conflict because presumably it would already know that she had misrepresented her permanent resident status earlier.

What steps should Smith have taken to (1) have avoided receiving unnecessary confidential information via the website from Nina [or any other prospective client] and (2) be able to identify potential conflicts before the scheduling of any appointment?

As discussed above, Smith's website should not ask a potential client to provide any more information than is necessary to identify a possible conflict in the first place. Best practice would be to limit the information request to name, address, age and general area of immigration relief sought. Such information would be the same as that provided by a potential client who calls to make an appointment either with a non-lawyer assistant or the lawyer herself. Smith's website should have a disclaimer making it clear that any other information provided will not be deemed confidential and may be used or disclosed by the lawyer in connection with other matters. Even that disclaimer might be inadequate if it is not communicated in an easily, understandable manner and does not secure an affirmative agreement. Most importantly, such a disclaimer without more might not satisfy the requirements of informed consent, as defined.

Smith could have avoided the dramatic consequences of having to cancel a meeting and refund the fee by changing the website appointment process. A prudent and conscientious lawyer should conduct the conflict check timely. Further, Smith should have made it a practice to timely read any and all information provided by the prospective client via the website, in addition to relying on the conflict software. Lastly, Smith should change the timing and language of the "non-engagement" appointment confirmation letter. As discussed above, a lawyer-client relationship may be established without a writing or affirmative agreement.

No matter what steps a lawyer takes to avoid receipt of disqualifying representation before a consultation, there is always the chance that such information will be disclosed in a questionnaire completed at the consultation or as part of the interview process. And it should also be noted that screening might be an option with respect to the duties owed to the prospective client pursuant to MR 1.18(d)(2).

Hypothetical Two (*Variation of Hypothetical One)*: I'll Check on It Later

Christina arranges for a consultation with Smith via his firm's website. On her online intake questionnaire, she stated that she is looking for "any immigration possibilities whatsoever." She explains in the narrative section that she was robbed at gunpoint while working at a local restaurant and has had extreme difficulty sleeping as a result. When she meets with Smith at his office, Christina tells Smith that she will be testifying soon in the criminal proceedings against the robber. She tells Smith that she has heard from some friends in her community that she might be able to pursue relief based upon her being a crime victim. Smith tells Christina that he doubts there is any relief available for her as a crime victim because he believes UCSIS has virtually stopped processing "U-visa" applications, but that he will check on it with another immigration lawyer at his firm to be certain since he mainly focuses on business immigrations matters. At that moment, Smith's assistant enters the room and tells Smith that the one-hour consultation time is up and that the next person is now waiting for his consultation. Upon hearing this information, Christina thanks Smith for his time and leaves. Smith does not contact Christina

thereafter. Three months after the consultation, Christina is arrested for excessive speeding and unlicensed driving and is subsequently detained by ICE.

Analysis

Do the interactions between Smith and Christina meet the requirements for deeming Christina a prospective or current client?

In order to determine Smith's ethical obligations to Christina, Smith must first determine whether she would be deemed a prospective client or a current client. (There is nothing to suggest that Christina is a former client.) As in the above scenario, when Christina filled out the questionnaire and Smith agreed to meet with her, Christina became a prospective client and Smith was obligated to keep the information she provided him confidential. However, once Smith provided legal advice to Christina, namely, that he did not believe she would be able to pursue U-visa status and undertook the obligation to confirm his opinion by checking with another lawyer at the firm, the relationship would likely be deemed a current lawyer-client relationship for purposes of other ethical rules. Smith's "non-engagement" letter would not be controlling, since he had created Christina's reasonable expectation that the relationship extended beyond the meeting when he promised to follow-up on the accuracy of his conclusion. As discussed above, a lawyer does not have to be formally retained for a lawyer-client relationship to be established. However, a non-engagement letter would at least help to prevent future understandings as to whether a current lawyer-client relationship exists.

What professional responsibility rules are implicated here if Christina is deemed a current client?

In addition to the obligation to maintain confidentiality (now under MR 1.6, since Christina is a client, among other rules applicable to current clients), Smith has an ethical obligation to provide Christina with competent (MR 1.1) and diligent representation (MR 1.3). Smith provided legal advice to Christina when he told her he did not believe she could pursue permanent residency through a U-visa. He had an obligation to provide her with correct advice. His admission that he was not sure, and therefore not essentially competent, would not excuse him unless he took action to verify his conclusion. His promise that he would check with a colleague and failure to let Christina know one way or the other also amounted to the failure to provide diligent representation. He should have informed Christina that there is relief available for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement officials, and that she should consult with another immigration lawyer who has more experience representing individuals with U visa applications.

Hypothetical Three: Prospective Client or Client?

Attorney Sam Helpful advertises in a local Spanish-language, free newspaper, Periódico Latino. The weekly paper is circulated widely in local grocery and "dollar" stores, as well as in freestanding news stands on local streets in Bigtown. Helpful's half-page ad features his services and reads, in English and Spanish:

Our office can help you with all types of immigration matters and your first consultation is FREE.
I will be available to meet with you to discuss your case this Saturday from 1-4.
Call me right away to reserve your time.
Our office has 25 years of experience resolving immigration issues for our clients and we are ready to do the same for you.
'Don't delay—your lawyer is one phone call away!"

Maria and Walter are Panamanian nationals who entered without inspection ten years ago. Both have limited educational backgrounds. They speak broken English and neither one can read or write in English. They have a 9-year-old U.S. citizen son, Sam. Walter has been working as a stone mason for Rock Construction Company for

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seven years. During that time, Walter developed expertise as a uniquely skilled stone mason. Walter's services are in high demand by Rock's clients who build custom homes around Bigtown.

Maria sees Helpful's ad in Periódico Latino and tells Walter she believes they finally have a chance to get green cards. Maria calls Helpful's office right away to schedule an appointment. Helpful's paralegal, Suzanne, advises Maria, in Spanish, to bring any documents pertaining to the couple's immigration matter, such as birth and marriage certificates and tax returns, among others. After scheduling the appointment, Maria and Walter tell their family and friends that they have found a lawyer who will help them remain in the U.S. legally.

On the day of the appointment, Suzanne greets Maria and Walter. She helps them fill out an intake form ("intake form"), which asks for detailed information regarding their family and work circumstances, as well as other information that could be relevant for possible grounds of other immigration relief. After the couple completes the intake form, Suzanne hands Maria and Walter another form written only in English ("disclaimer form") that advises in bold type that although Helpful will provide a free one-hour consultation, no attorney-client relationship will be established until both Maria and Walter sign a written retainer. Speaking to the couple in Spanish, Suzanne tells Maria and Walter that they must sign this second form before meeting with Helpful. Suzanne does not translate the wording of the form into Spanish for Maria and Walter. Maria and Walter each sign the form and Helpful calls them into the conference room for their meeting.

Helpful spends one hour with Maria and Walter going over the information in the intake form and speaking only English, which they seem to understand, he elicits additional information regarding potential immigration relief. Helpful also makes copies of the documents that Maria and Walter brought with them and returns the originals. He does not present the couple with a retainer agreement and they do not discuss any fees. After realizing that he has spent over an hour with the couple, Helpful tells the couple that time is up and thanks them for coming in. He tells them he has another consultation scheduled.

Analysis

What factors support the conclusion that Maria and Walter are prospective clients as defined in MR 1.18?

Maria and Walter would be deemed prospective clients at the point in which they provided confidential information and documents to Helpful's staff member and then consulted directly with Helpful about obtaining a green card. Making the appointment without more would not trigger a prospective client designation as defined under MR 1.18. Because Maria and Walter did not formally retain Helpful—verbally or in writing—there is a good argument to be made that they be treated only as prospective clients for purposes of confidentiality and conflicts avoidance. However, as discussed below, because many of Helpful's procedures create ambiguity, the line between characterizing Maria and Walter as "prospective" versus "current" clients is blurred.

What factors support the conclusion that Maria and Walter may be deemed implied current clients subject to the obligations imposed under MR 1.7?

The language used in Walter's advertisement in a Spanish language newspaper contributes to the conclusion that a lawyer-client relationship could have been established at the moment a potential client made an appointment for a consultation. The phrase "your lawyer is one phone call away" suggests that all Maria and Walter need to do is call him. When they do call, Suzanne tells them to bring documents such as birth certificates and tax returns to the consultation. Further there is no evidence that Suzanne tells them that she is not a lawyer, and the couple have every reason to think she was as well. Helpful's advertisement does not signal in any way that the purpose of the "consultation" is to help Maria and Walter decide if they are going to retain Helpful or for Helpful to decide if he can successfully represent them.

Further, when Maria and Walter come to Helpful's office his paralegal assists them in disclosing detailed confidential information on a form without any cautionary language advising them as to how the information will be treated. When Helpful meets with the couple he makes copies of the original documents, which is another indication that a lawyer-client relationship has been formed. The manner in which he terminates the meeting is ambiguous. He gives only the reason that his time is up. When he says goodbye and wishes them well, Helpful does not signal in any way that he is unwilling to represent them.

Given the way he handles "free" consultations, it is not surprising that Helpful tries to dispel the notion that a lawyer-client relationship has been formed by requiring potential clients to sign a disclaimer form. However, disclaimer language is not dispositive for two reasons. The first is that the course of conduct establishes the lawyer-client relationship, not a written document. Second, it is likely that Maria and Walter did not even know the terms of the form they signed since it was in English and the paralegal did not explain the contents to them. In fact, because the paralegal told Maria and Walter they had to sign the document before meeting with Helpful, they had good reason to believe they were signing some sort of engagement letter in the first place. If a lawyer-client relationship were established here, Helpful would be subject to all of the obligations owed to clients under the professional responsibility rules, at a minimum, those of competence under MR 1.1 and diligence under MR 1.3. This would include the obligation to clarify the consequences of the "non-engagement."

What factors support the conclusion that Walter and Maria may be deemed former clients subject to the obligations imposed under MR 1.9?

Maria and Walter could only be deemed former clients if they were deemed current clients in the first instance and even then, it would be hard to call them former clients under the ambiguous circumstances under which the meeting was terminated after one hour because the lawyer had another meeting scheduled, and the lack of further information in the scenario itself as to what occurred after Maria and Walter left the meeting. Here, there is no evidence that they contacted Helpful or that he reached out to them after the consultation.

As we discuss below, Helpful would be obligated to maintain the confidentiality of any information Maria and Walter provided him and to avoid any conflicts of interest under MR 1.7, MR 1.18 and MR 1.9.

What duties are owed to Maria and Walter under MR 1.7, MR 1.18 and MR 1.9?

Helpful would be required to maintain the confidentiality of any information provided by Maria and Walter under all of the above rules. If for example, Helpful was engaged by an employer of Maria or Walter in connection with an I-9 audit, he would not be able to reveal to the employer that both were undocumented. Helpful would have a conflict of interest if either Maria or Walter requested Helpful's representation in obtaining a divorce from the other or seeking permanent residency on the basis of abuse.

What steps could Helpful have taken to limit receipt of disqualifying confidential information?

Helpful could limit the impact of the above confidentiality and conflict rules, in particular as they pertain to prospective clients by following best practices. In the first instance, because Helpful is advertising in a Spanish language newspaper, he should take steps to ensure there is a reputable translator present when speaking to the prospective client in English, and to the degree possible, prepare written communications and forms in both Spanish and English. In the case of immigration forms to be submitted, he should use a reputable translator to make sure his clients actually understand what they are signing. Any document to be signed by the clients should be translated into Spanish, and an interpreter should read and explain the terms used in the document to ensure they understood what they were being asked to sign. Helpful should limit intake of confidential information to what is reasonably necessary to determine if a conflict exists and advise clients as to how such information will be treated for confidentiality purposes. As for Helpful's advertising, he should consider providing a disclaimer in the advertisement itself. At a minimum, Helpful should direct his paralegal to advise callers that the purpose of the

consultation is to determine whether or not a lawyer-client relationship will be established. Helpful should also consider providing either an engagement letter or a non-engagement letter to prospective or current clients.

Hypothetical Four *(Variation of Hypothetical Three)*: Use of Disclaimers in Foreign National's Language

The disclaimer form is written in Spanish. Helpful advises Maria and Walter at the outset that their meeting is only a consultation, without explaining the difference between a consultation and a meeting based on an attorney-client relationship

Analysis

As discussed above, the fact that the disclaimer is written in Spanish would, as a matter of best practice, evidence that Helpful had given Maria and Walter an opportunity to understand the basis on which Helpful would undertake representation. However, as discussed above, the disclaimer alone would not be enough to make the determination whether a prospective client or lawyer-client relationship has been formed.

As discussed above, advising Maria and Walter at the outset of the meeting that it was a consultation combined with the fact that the signed disclaimer had been written in Spanish would go a long way in supporting the conclusion that Maria and Walter be deemed prospective clients only, but there still are other ambiguities that would cloud that conclusion.

Also, as discussed above, Helpful would still be obligated to maintain confidentiality and avoid conflicts of interest under MR 1.18.

Hypothetical Five: Duties Owed to Former and Prospective Clients

Jane is a partner in a two-lawyer firm. She maintains a niche practice where most of her clients are foreign national physicians. Some of her work, consequently, involves helping her clients obtain waivers of the foreign residence requirement that attaches when a foreign national pursues a U.S. clinical residency program while in J-1 status. By the time they complete their residencies, many of these physicians have married U.S. citizens and, in some cases, have become the parents of U.S. citizen children.

Ordinarily, the J-1 foreign residence requirement would preclude such a physician from adjusting to lawful permanent resident status on the basis of marriage to a U.S. citizen, at least until the physician satisfies that requirement by leaving the United States and spending at least two years in his or her home country. There are, however, limited ways to secure a waiver of that requirement. One such way is by demonstrating that remaining outside the United States for two years would cause exceptional hardship to the foreign national's U.S. citizen spouse or children.

In Jane's office, Jane meets with Sarah, a U.K. national, and Bill, Sarah's U.S. citizen husband in connection with Sarah's desire to obtain permanent residency. Sarah and Bill advise Jane that they have a five-year-old daughter named Emma. Sarah is currently in J-1 status and nearing the end of an advanced six-year surgical residency and understands she needs to take some action. Jane tells Sarah and Bill that Bill can file a Form I-130 petition for alien relative on Sarah's behalf, but advises Sarah that she will not be able to submit a Form I-485 adjustment of status application until after she obtains a waiver of the J-1 foreign residence requirement. Jane raises the possibility of an exceptional hardship waiver application, and she explains the process to Sarah and Bill and outlines the legal standard.

In response, Bill mentions that Emma has been getting into trouble in kindergarten for "telling stories" and "acting out" and that "Emma may need to get professional help." He also mentions that he is a recovering alcoholic and has been sober for four years. Bill suggests that those factors may form the basis for the "hardship"

exception, if Sarah had to return to the UK on her own or if they were all required to move there. Before commenting on Bill's suggestion, Sarah looks at her watch and abruptly ends the meeting, saying that she had forgotten about a scheduled playdate for Emma. Although rushed, Sarah thanks Jane for her time, and she and Bill leave Jane's office, stopping in the reception area to pay the agreed upon fee for Jane's time and to retrieve Emma, who had been talking with the receptionist while playing with some of the toys that Jane and her law partner keep on-hand for that purpose.

The next day, Jane receives a phone call from Sarah. Sarah tearfully tells Jane that Bill had lied during the consultation about being sober and that he had previously been violent. She explains to Jane that previously she had been afraid to move and take Emma with her for two reasons: (1) she was afraid Bill would become even more violent and (2) that he would fulfill repeated threats to "destroy" her if she left. He said he would call his friend, an ICE agent, who could see to it that Sarah be deported. Sarah tells Jane that she had thought about the situation overnight and decided that she had "had enough." Sarah asks Jane for the phone number of Jane's law partner, a prominent domestic relations lawyer. Sarah tells Jane that "someone has to protect Emma and me." Sarah then begs Jane to help her obtain permanent residency and stay in the U.S. under the changed circumstances.

Analysis

This scenario presents questions as to what, if any, are Jane's obligations to Sara and Bill as a result of the consultation she had with them? Her obligations will depend to some degree on whether each or both are deemed prospective, former or current clients.

What factors support the conclusion that Sarah and Bill should be deemed prospective clients?

Sarah and Bill should be deemed prospective clients at the consultation as defined under 1.18 because they consulted together with Jane "about the possibility of forming a client-lawyer relationship with respect to a matter" of Sarah's obtaining permanent residence, presumably through a marriage-based petition brought by Bill. In Sarah's presence, Bill provided additional confidential information about himself and the couple's daughter Emma.

What factors support the conclusion that Sarah and Bill should be deemed current clients?

Sarah and Bill could arguably be deemed implied current clients even though Sarah ended the consultation abruptly, before Jane and the couple had an opportunity to expressly agree on the representation, given that they asked for legal advice from Sarah and received it. Although there was no expressed meeting of the minds as to representation, nothing occurred at the consultation that suggested Sarah and Bill were in doubt about pursuing the matter with Jane as their lawyer. Sarah abruptly ended the consultation, but the stated reason for doing so was unrelated to the substance of the meeting. There remains some ambiguity as to their status given the absence of an express oral or written engagement agreement or non-engagement.

Should dual representation be considered?

Whether Sarah and Bill are prospective or current clients, they came to see Jane as a couple seeking relief that would be to their mutual benefit and the benefit of their daughter. As such, they should be deemed joint prospective or current clients in the first instance.

What obligations have been imposed on Jane as a result of the consultation?

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Jane would have to preserve the confidentiality of the information she obtained from Sarah and Bill during the consultation vis-à-vis the outside world irrespective of whether they are prospective or current clients. As between Sarah and Bill, since they are essentially joint prospective or arguably joint current clients, Jane presumably would not be required to maintain confidentiality as between Sarah and Bill. However, because Jane did not affirmatively ask for mutual waivers of confidentiality as would be good practice in joint [or dual] representation cases, Jane could, and as we discuss below, be confronted with a conflict involving her separate duty of loyalty to Sarah or Bill, as individuals.

What are Jane's obligations to Sarah and Bill, as joint prospective or current clients, after she receives the call from Sarah indicating that Sarah wants to divorce Bill and still wants to obtain Jane's help in obtaining permanent residency nevertheless?

When Sarah calls Jane and speaks to her outside the presence of her husband, Jane receives confidential information which she would be obligated to disclose to Bill based on her duty of loyalty to him. Jane is facing the classic dual representation conflict with respect to confidentiality and she would not be able to disclose the information to Bill without Sarah's informed consent. Further because of this conflict, under either MR 1.7 or MR 1.18, Jane could not represent Sarah alone in any immigration matter without Sarah's informed consent to disclose the information to Bill or Bill's informed consent to represent Sarah alone. (Under MR 1.18 Sarah's information must also meet the "significantly harmful" test as to Bill as a prospective client.) The allegation by Sarah that Bill is abusive would meet this test. Absent such informed consent Jane would be required to withdraw from representing Sarah in her immigration mater or divorce, since both are substantially related to the original consultation or representation.

In what way, if any, would Jane's conflicts affect representation of Sarah by Jane's domestic relations partner?

Jane's conflict is imputed to all members of her firm under MR 1.10, MR 1.9 and MR 1.18. Accordingly, Jane's partner or any other member of the firm would be conflicted from representing Sarah in the same (the immigration matter) or a substantially related matter (the divorce), if either was materially adverse to Bill, without the informed consent of the affected parties. MR 1.18 provides a little more leeway to the disqualified lawyer. An otherwise disqualified lawyer would be permitted to represent Sarah in the divorce matter even without Bill's informed consent under MR 1.18(d)(2)(ii) if Bill were provided with proper notice, the firm enacted appropriate screening procedures and Jane had taken reasonable steps to limit receipt of confidential information from Sarah. As a practical matter, it would be hard for the firm to satisfy this more relaxed standard given the small size of the firm, making screening more difficult and the likelihood that Bill could take legal action to move to disqualify. Here, there is no question that the allegations of abuse by Bill could be an issue in both Sarah's immigration case—if it is based on VAWA—as well as the divorce as it related to child custody issues.

Hypothetical Six *(Variation of Hypothetical Five)*: Prospective Client Though Not Present

The consultation is only between Jane and Sarah. Bill is not present. Sarah does not mention any marital problems. Bill then speaks to Sarah by phone the evening of the meeting and subsequently sends Jane an email in which he thanks Jane for taking the time to meet with Sarah and tells Jane that he looks forward to working with her "to get Sarah a green card" provided he can "sort out paying the fee." He cites the "hardship" that would occur if Sarah were forced to leave the United States, and he mentions his past alcoholism and current sobriety. The next day, Sarah makes her tearful plea to Jane.

Analysis

What are Jane's obligations to Bill and Sarah now?

Because Bill was not at the meeting, Jane does not have confirmation that Bill is on-board to file a marriage-based petition on Sarah's behalf. Bill does not become a prospective client until he actually contacts Jane by phone. When Bill does call he essentially confirms that Sarah was authorized to speak on his behalf and thus he would be considered a prospective client in the same way Sarah is one. He probably would not be deemed a joint current client because he mentions that he is not yet prepared to pay Jane's fee, but he also indicates that he looks forward to working with Jane on Sarah's case. The scenario is silent as to how Jane handles her fee payments. This would likely keep him in the joint prospective client stage with respect to the marriage-based petition. When Bill mentions the "hardship" issue and his past alcoholism and alleged sobriety, he is providing confidential information that Jane will have to keep confidential should Jane and Bill's interests become adverse. Given that Sarah's immigration matter concerns her getting permanent residency, all of the remedies available to her—Marriage-based, VAWA or hardship—would be deemed the same or substantially related matters for conflict purposes under MR 1.7, MR 1.9 or MR 1.18.

Hypothetical Seven: A Quick Conversation in the Reception Area

Carl, Claire, and Conrad are partners at "3C LLP," a small law firm that represents clients in both immigration and family law matters. Carl and Conrad do most of the immigration work, and Claire does most of the family law work. Because of their firm's small size and the fact that they talk about most cases with each other, they do not use a formal conflict check system for new clients.

Jose, a Guatemalan national, speaks to Claire in a telephone conversation about his desire to obtain a divorce. He states that he wants to retain her and Claire agrees to represent him in connection with the contemplated divorce. Claire and Jose agree to meet in her office the next day. Jose asks his sister Pilar to drive him to the 3C LLP law office for the meeting with Claire. While she is waiting in the reception area for Jose to finish his meeting with Claire, Pilar sees Carl who had spoken at her church. Because she knows he does immigration work, she asks if she could talk to him for a moment. He agrees. Pilar tells Carl about her brother Jose's immigration status. Jose had entered the U.S. without inspection and had been living in the U.S. for six years ever fearful of being caught and deported. During that time, he married a US citizen, Louise, and they had two US born children together. However, Louise had not yet filed any paperwork with USCIS on Jose's behalf because Jose was afraid to. The couple's youngest son had retinoblastoma, an unusual eye cancer. This made Jose especially fearful. Carl listened passively to Pilar's story about Jose, but, when he heard about Jose's son's illness, Carl expressed concern. Carl asks Pilar whether the illness is treatable. Pilar replies that the son is receiving good care in the US, but she is pretty sure that there is not similar treatment available in Guatemala. Carl tells her that he'd be happy to advise Jose on his immigration issues, if Jose made an appointment to see him. Pilar tells Carl she would relay the information to Jose.

Meanwhile, in his consultation with Claire, Jose expounded on his reasons for considering a divorce. Jose told her that his son had an illness which had caused discord in the marriage. He told her that his wife had become distraught and prone to violent outbursts. She had even hit him with a tire iron in a fit of rage. The abuse had caused him to have severe recurring migraine headaches and double vision which is why he had asked Pilar to drive him to the law office. He told Claire he was very unhappy in the marriage but also concerned about how a divorce would affect his children. Claire explained to Jose that he could seek a no-fault divorce but that there would likely be child custody issues which could be a problem, in light of his wife's abusive behavior. She recommended several different courses of action as to the divorce presenting the pros and cons of each one. Jose got so upset he was having trouble concentrating. He told Claire he wanted to go home but he still wanted her to handle his divorce.

On the trip home, Pilar tells Jose she had spoken to Carl on his behalf about his immigration status and that Carl had offered to advise Jose after hearing about Jose's son's health problems. Jose thanks Pilar for her concern and while listening to her about seeing an immigration lawyer, Jose realizes his first priority should be to seek permanent residency before taking any steps to end the marriage.

Jose then appeals to his wife to treat him more kindly and help resolve his immigration problem in order to provide more security for their sick son. Louise agrees to meet with an immigration lawyer. Because Jose has heard from a good friend that Conrad was an excellent immigration lawyer, he decides to schedule an immigration consultation with him, rather than Carl. Jose does not inform Conrad that he has consulted with Claire about a divorce or that Pilar has discussed his case with Carl on his behalf. Prior to the consultation, Conrad does not check to see if Jose or his wife has had any dealings with Carl or Claire. Jose and his wife meet with Conrad and they ask him to prepare and file a marriage-based petition with the USCIS. Conrad does so within a few days. Before the petition is approved, Louise contacts Conrad. She tells him she has learned that Jose was having an affair with their next door-neighbor and has decided she wants to divorce Jose. She says she realizes that Jose was just using her to obtain permanent residency. She demands that Conrad withdraw her petition on Jose's behalf.

Analysis

Who is the client? Who is the lawyer? And, what is the nature of the relationship?

Jose as Claire's current client:

Under the facts surrounding Jose's contact with Claire about his divorce, Jose and Claire had a meeting of the minds as to the representation. Jose had already asked Claire to represent him prior to his visit to her office. He provided Claire with confidential information and Claire provided legal advice specific to his case. Although Jose cut short the meeting, he did not in any way advise Claire that he no longer required her services. Under MR 1.7 concerning current clients, Claire would have to preserve Jose's confidential information and avoid any potential conflict of interest. For example, she could not represent Louise in any divorce action commenced by Jose. Under MR 1.10(a), Claire's conflict would be imputed to members of her firm.

Jose as Claire's former client:

When Jose decided unilaterally not to pursue a divorce, he became a former client of Claire's. His status as a former client is clouded by the fact that he did not advise Claire that he had decided not to pursue the divorce and, instead, engaged Conrad to pursue permanent residency through his marriage. Although there is no indication in the scenario that Claire learned from Jose that he had changed his mind, she would have learned that, at a minimum, if Conrad had conducted a conflict check, which he did not. We will address conflict checks later in this discussion.

As a former client, under MR 1.9 [and MR 1.10] any conflict arising from Jose's status as Claire's former client would be imputed to all members of her firm, here Carl and Conrad. At the time Jose met with Conrad, he would be deemed Claire's former client.

Jose as Carl's prospective client:

Although Jose never spoke directly to Carl, he could be considered Carl's prospective client based on Carl's discussion with Pilar on Jose's behalf in which he received confidential information and then offered to meet with Jose formally at a consultation. From Carl's point of view, Pilar was essentially acting as Jose's agent, under common law. From Jose's point of view, he seems also to have viewed Pilar as his agent. He took no steps to advise Pilar or Carl that Pilar had not been authorized to speak on his behalf or reveal confidential information. Under agency theory, Jose would be deemed a prospective client through Pilar. If Jose had scheduled an appointment with Carl in response to what Pilar told him, his status as a prospective client would be based on that appointment alone. Since Jose was Carl's prospective client, Carl would be required to maintain the

confidentiality of the information imparted by Pilar and avoid any conflict of interest between Jose and his or his firm's current client.

Jose as Conrad's current client:

When Jose decided to abandon plans for a divorce and retain Conrad to pursue marriage-based permanent residency, he became Conrad's client. Because Louise is the petitioner, she is also Conrad's client. For purposes of confidentiality and conflicts avoidance, Jose and Louise would be deemed Conrad's joint current clients. Here, as discussed above, the representation is complicated by Claire's and Carl's imputed conflicts.

Louise as Conrad's current client:

As discussed above, absent any affirmative agreement otherwise, Louise would be deemed Conrad's current joint client, triggering a current client conflict when she advises Conrad that she wants to terminate the petition because Jose has cheated on her.

Under MR 1.9 or MR 1.18, would Conrad be disqualified from representing Jose and his wife in the permanent residency matter? If so, under what circumstances would the representation be permissible?

Because Jose is deemed Claire's former client, Claire is bound to keep information obtained in connection with that representation confidential. This would include the fact that Jose had contemplated divorcing his wife, that his wife had been abusive to him and that his son suffered from an illness that might not be treatable in Guatemala. She would have a conflict between her obligation to Jose to maintain confidentiality with her obligation of loyalty to any firm current client in the same or substantially related matter. As discussed, her conflict is imputed to other members of the firm, including Conrad. As such Conrad would be disqualified from representing Jose and Louise as joint clients in the permanent residency petition. His duty of loyalty to Louise (concerning Jose's previous plans to divorce, for example) would conflict with Jose's interests in Louise's agreement to file the petition in the first instance.

Under MR 1.9, Conrad would only be allowed to go forward with the representation with the informed consent of both Jose and his wife. Conrad would have to explain to Jose that he had a conflict by virtue of Jose's consultation with other lawyers in the same firm, either on his own or through his sister, and obtain Jose's informed consent to disclose confidential information to Louise that is material to the permanent residency matter, i.e., that Jose had wanted a divorce and may not really want to remain in the marriage once the petition is approved. Louise would have to provide informed consent to Conrad's continued representation as well.

*Was Carl bound by MR 1.18 not to pass information about Jose, and his sick child to Conrad**?***

Because Jose could also be deemed Carl's prospective client (through Pilar's status as Jose's agent), Carl would be obligated under MR 1.18 to maintain the confidentiality of information about Jose and his family provided by Pilar. As above, this would include information that the couple's son suffered from an illness that might not be treatable in Guatemala. Carl would be unable to reconcile his obligation to Jose to maintain confidentiality with his obligation of loyalty to any firm current client. The son's illness could be used as an alternative means for Jose to obtain permanent residency through an application for cancellation of removal before an immigration judge if he has been physically present for at least ten years and satisfies other requirements, including that his removal would result in "exceptional and extremely unusual hardship" to his U.S. citizen spouse or children. He may also be eligible for an unlawful presence waiver based on evidence of extreme hardship to his U.S. citizen spouse. For this type of waiver, hardship experienced by a non-qualifying relative can be considered as part of the extreme hardship, but only to the extent that such hardship affects a qualifying relative. Louise might want to know about these possible remedies before agreeing to file the petition or later

deciding to divorce Jose. As in Claire's case, Carl's conflict is imputed to other members of the firm, including Conrad.

Conrad would be disqualified from representing Jose and Louise as joint clients in the permanent residency petition. His duty of loyalty to Louise (concerning other avenues of relief for Jose), for example, would conflict with Jose's need for Louise to cooperate in filing the petition in the first instance. Because of Carl's imputed duties to Jose as a prospective client, Conrad would only be allowed to go forward with the conflicted joint representation with the informed consent of both Jose and Louise. Conrad would have to explain to Jose that he had a conflict by virtue of the imputation of Carl's conflict and obtain his informed consent to disclose and, if necessary, use the information about the son's illness to Jose's advantage as an alternative to the permanent residency petition.

Waiver of Conflicts

As discussed, Conrad would be able to avoid disqualification if he were able to obtain Jose's and Louise's informed consent to the conflicts applicable to Carl (under MR 1.18(d)(1)) and Claire (under MR 1.9). Carl's prospective client conflict could also theoretically be resolved without Jose's consent under the second exception provided in MR 1.18(d)(2). While Carl could satisfy the requirements of screening (under MR 1.18(d)(2)(i)) and prompt written notice to Jose (under MR 1.18(d)(2)(ii)), Carl could not satisfy the fundamental requirement that he had taken reasonable steps to limit the degree of information he received from Pilar. By listening "passively" to Pilar who provided specifics about Jose's immigration status and family information, Carl obtained more information than was necessary to identify any potential conflict. All Carl needed to know was Jose's name and that he might be in need of help with an immigration problem. By following an adequate conflicts check, Carl would have been able to learn that Claire was already representing him.

Protective Steps [70]

Carl, Claire and Conrad each could have avoided the conflict that arose if their firm had procedures in place to identify conflicts. While a computer software program might be the most efficient, firm lawyers could have also relied on file opening procedures, or simple email or text based inquiries providing the name and nature of the possible representation. Conrad's failure to conduct a conflict check, or to know that Claire had opened a file for Jose's divorce, set the conflict problem in motion. Upon learning that both Claire and Carl had obtained confidential information about Jose and his family, Conrad would have been able to advise Jose and Louise upfront about the conflict issues and taken steps to either obtain waivers from each or otherwise decline the representation altogether.

Carl and Claire could also have relied on other best practices to avoid the conflicts that occurred. It does not appear that Claire took any steps to follow up with Jose after he abruptly left the meeting. If she had reached out to him, presumably she would have learned that he had changed his mind about the divorce and had in fact decided to engage her partner to handle the immigration matter.

Carl did not follow best practice when he failed to advise Pilar that the information she was providing was confidential to Jose and failed to take steps to limit the information. He could simply have told her if Jose (or Pilar, on Jose's behalf) was interested in obtaining assistance with an immigration matter, he would be happy to do so in a consultation. Given that he encountered Pilar in his firm's reception room, he should have avoided having any substantive conversation with her. Under the circumstances, his failure to do a conflict check seems even more egregious.

[70] As previously noted in this EC, and every other, lawyers should always be mindful of the current status of any applicable state version of the Model Rules. For example, under New York Rules of Professional Conduct, lawyers or law firms are required to have systems in place to identify conflict of interest.

Conrad also should have followed best practice by expressly addressing the issue of joint representation in the marriage based permanent residency matter, which would have included waivers of confidentiality and the possibility of withdrawal from the representation should an irresolvable conflict arise.

E. Summary of State Variations of Model Rule 1.18

States That Have Adopted MR 1.18 (verbatim)

Delaware
Iowa
Louisiana
Massachusetts
Utah
West Virginia
Wisconsin

States That Have *Not* Adopted MR 1.18[71]

Alabama
Georgia
Michigan
Mississippi
Texas[72]
California [73]

States with Minor Substantive Differences, but Otherwise Essentially the Same as MR 1.18

Alaska

Alaska continues to use the pre-Ethics 20/20 rule, which varies in language. For example, in Section A, Alaska's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Alaska maintains the pre-adoption language of "had discussions with" instead of "learned information."

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[71] A small number of states did not adopt MR 1.18, but in the preamble to their state rules, the non-adopting states commented on the topic of "prospective clients." Non-adopting states[71] have included the following statement in their preamble: "Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties such as that of confidentiality under Rule 1.6 that may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact."

[72] Texas' position is substantively similar to its counterparts. Texas's rule states: "Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. For purposes of determining the lawyer's authority and responsibility, individual circumstances and principles of substantive law external to these rules determine whether a client-lawyer relationship may be found to exist. But there are some duties such as that of confidentiality that may attach before a client-lawyer relationship has been established." Tex. R. Prof Conduct Preamble.

[73] California's Rules of Professional Conduct are structured differently from the Model Rules. There is no comparable rule.

Arizona

Unlike the Model Rule, Arizona's Rule conditions disclosure of information from a prospective client on compliance with both E.R. 1.9 *and* E.R. 1.6. In Section D, Arizona's Rule imposes additional requirements on representation after receipt of disqualifying information. Arizona requires the disqualified attorney to: 1) provide written description of the particular screening method adopted; 2) describe when the screening method was adopted; 3) provide a written assurance from both the disqualified lawyer ***and*** the new firm that the prospective client's confidential information was neither disclosed nor used in violation of the Rules; 4) provide an agreement by the new firm to promptly respond to any written inquiries or objections by the prospective client about the screening procedure. Lastly, Arizona's Rule imposes an additional requirement of reasonable belief on the part of both the disqualified lawyer and the partners of the new firm. Specifically, both the disqualified lawyer and the firm must "reasonably believe" that the chosen screening method will effectively prevent disclosure of the client's confidential information to both the firm and the client.

Arkansas

Arkansas' Rule differs from the Model Rule by modifying Section B in two ways. First, it omits the word "that" before "information." Second, it adds of the phrase "learned in the consultation" after the word "information."

Colorado

Colorado's Rule replaces "that person in the matter" with "the prospective client" in Section C.

Connecticut

Connecticut retains the pre-Ethics 20/20 language of "discusses" while adding "communicates" to broadly protect conversations with prospective clients. However, Section D of Connecticut's Rule does not prohibit a disqualified attorney from receiving apportioned fees in connection with the representation.

District of Columbia

D.C. differs from the Model Rule in several ways. First, unlike the Model Rule, the District of Columbia's Rule 1.18A conditions disclosure of information from a prospective client on compliance with Rule 1.6, which covers with Confidential Information, instead of Rule 1.9, which governs Former Clients. Second, D.C.'s Rule replaces "information" with "confidence or secret." Third, D.C.'s Rule does not require that a "confidence or secret" obtained be potentially "significantly harmful to that person in the matter." Fourth, D.C.'s Rule bars outright use of "confidence or secret[s]" obtained from the prospective client. Fifth, D.C.'s Rule deletes the requirement that informed consent be "confirmed in writing." Sixth and finally, D.C.'s Rule does not require that a disqualified attorney take reasonable measures to avoid additional exposure to disqualifying information or prohibit a disqualified attorney from receiving apportioned fees in connection with the representation.

Florida

Florida's Rule adds various headings to each Section. Specifically, Section A is titled "Prospective Client," Section B is titled "Confidentiality of Information," Section C is titled "Subsequent Representation," and Section D is titled "Permissible Representation." Additionally, Florida's Rule lowers the standard for use of information adverse to a prospective client by replacing the phrase "significantly harmful" with "used to the disadvantage of."

Hawaii

Like Florida, Hawaii's Rule adds headings to each Section. Specifically, Section A is titled "Definition of a prospective client," Section B is titled "Duty of confidentiality in prospective clients," Section C is titled "General conflict of interest duties apply," and Section D is titled "Representation is allowed with consent or screening." Hawaii's Rule continues to use the pre-Ethics 20/20 rule, which replaces certain language used in the Model Rule. For example, in Section A Hawaii's Rule replaces the word "consult" with "discuss" and, in Section B, Hawaii's Rule maintains the pre-adoption phrase "had discussions with" (later replaced with "learned information" in the Model Rule). Additionally, Hawaii's Rule does not specifically require an attorney to "hav[e] discussions" with a client, but does require information obtained be "learned in the consultation." Section D(1) of Hawaii's Rule replaces the requirement for "informed consent" with that of "consent after consultation." In that same Section, Hawaii's Rule replaces the requirement that a disqualified attorney "not obtain more disqualifying information than was reasonably necessary" with the requirement that a disqualified attorney "took reasonable measures to avoid exposure."

Idaho

Idaho's Rule is substantially similar to the Model Rule, only adding the phrase "learned in the consultation" to its version of Section B.

Illinois

Illinois' Rule is substantially similar to the Model Rule, but does not require that consent be "confirmed in writing" or that the prospective client be given prompt notice about the disqualified lawyer's screen or fee arrangement.

Indiana

Indiana's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A Indiana's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Indiana maintains the pre-adoption language of "had discussions with" instead of "learned information."

Kansas

Kansas's Rule adds "Client-Lawyer Relationship" as a title to "Duties to Prospective Client."

Kentucky

Kentucky's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A Kentucky's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Kentucky maintains the pre-adoption language of "had discussions with" instead of "learned information."

Maine

Maine's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A, Maine's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Maine maintains the pre-adoption language of "had discussions with" instead of "learned information."

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Maryland

Maryland's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A Maryland's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Maryland maintains the pre-adoption language of "had discussions with" instead of "learned information." In addition, Section D of Maryland's Rule does not require that the attorney who received the information take reasonable measures to avoid exposure to more disqualifying information and does not require prompt written notice to be given to the prospective client.

Minnesota

Minnesota's Rule is substantially similar to the Model Rule, but replaces "learned information from" with "consulted with" and adds "obtained in the consultation" to Section A.

Missouri

Missouri's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A Missouri's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Missouri maintains the pre-adoption language of "had discussions with" instead of "learned information" and conditions disclosure on compliance with its Rule 4-1.9.

Missouri's Rule also merges Model Rule (d)(2) and (d)(2)(ii). Specifically, Missouri's Rule requires that the lawyer who received the information take reasonable measures to avoid additional exposure to disqualifying information. The disqualified lawyer must also be timely screened from participating in the matter. Unlike the Model Rule, Missouri's Rule does not prohibit the attorney from being apportioned fees relating to the matter.

Montana

Montana's Rule blends language used pre-Ethics 20/20 with language used in the Model Rule. For example, in Section A, Montana's Rule adds "or has had consultations" with a lawyer as an additional avenue for forming a client-lawyer relationship. Likewise, in Section B, Montana's Rule maintains the pre-adoption language of "had discussions with" instead of "learned information." Unlike the Model Rule, however, Montana's Rule does not require that the attorney take reasonable measures to avoid additional exposure to a prospective client's confidential information.

Nebraska

Nebraska's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A Nebraska's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Nebraska maintains the pre-adoption language of "had discussions with" instead of "learned information."

Nevada

Nevada adopts, in whole, Sections A-D of the Model Rule, but adds Section E, F, and G.

Section E expounds on the circumstances that preclude a finding of a client-lawyer relationship. Specifically, a person is not a "prospective client" where a person communicates information to a lawyer without any reasonable expectation that the lawyer is willing to discuss the possibility of representation. Likewise, a person is not a "prospective client" where the person's communication to the lawyer is not based on a good faith attempt to retain the lawyer.

Section F permits a lawyer to condition conversations with prospective clients on the client's informed consent that no information disclosed during the communication will prevent the attorney from representing a different client in the matter. Nevada's Rule also authorizes subsequent use of the information received from the prospective client if the client consents and the agreement expressly permits.

Section G discusses a lawyer or law firm's duty to a prospective client when the client is requesting information regarding potential representation. Specifically, the lawyer or firm must provide written information described in Rule 1.4(c). If the information requested includes a fee contract, each page must be marked "SAMPLE" in red ink in a type size one size larger than the largest type used in the contract and the words "DO NOT SIGN" shall appear on the client signature line.

New Hampshire

New Hampshire's Rule departs from the Model Rule through its use of broad language. First, Instead of the Model Rule's requirement that a person "consult" with a lawyer to be considered a prospective client, New Hampshire's Rule considers any person who "provides" information to a lawyer a prospective client. Second, Section B of New Hampshire's Rule prohibits disclosure of confidential information if the lawyer has "received and reviewed" the information, while the Model Rule's prohibits disclosure of "learned information." Finally, Section D of New Hampshire's Rule requires a lawyer to both receive and review disqualifying information before permitting representation.

New Jersey

New Jersey's Rule differs from the Model Rule in several material respects. First, New Jersey's Rule in Section A employs similar language from Model Rule's Section B. New Jersey's Rule uses the phrase "has had communications in consultation with" a prospective client instead of the Model Rule's "learned information." Second, New Jersey's Rule conditions use of confidential information on compliance with RPC 1.9 instead of Model Rule 1.9. Third, while New Jersey's Section B is similar to Model Rule Section C, New Jersey's Rule replaced the Model Rule's term "prospective client" with "former prospective client." Fourth, New Jersey's Rule moves the discussion of disqualified lawyers and their firm's inability to knowingly undertake or continue representation to Section C, which is similar to Section D of the Model Rule. Specifically, the first sentence of Section C is extracted from the last sentence of Model Rule D. Fifth and finally, Section D of New Jersey's Rule is substantially similar to Model Rule Section A, but New Jersey's rule continues to use the pre-adoption Ethics 20/20 term "discuss" instead of "consult" and treats an individual with whom no client-lawyer relationship materializes as a "former prospective client."

New Mexico

Like Florida and Hawaii, New Mexico includes headings before each Section. Section A is titled "A definition of "prospective client"; Section B is titled "Confidential information," Section C is titled "Certain representations prohibited" and Section D is titled C "When representation is permitted." Section B of New Mexico's Rule replaces the requirement that disclosure comply with Rule 1.9 with "Rule 16-109 NMRA of the Rules of Professional Conduct."

New York

New York's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A, New York's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, New York maintains the pre-adoption language of "had discussions with" instead of "learned information."

Importantly, New York's Rule modifies Section (d)(2)(i) of the Model Rule, which discusses the timely screening of the disqualified attorney and the prohibition of fee apportionment. Instead of focusing on the timely screening of the disqualified attorney, New York's Rule focuses on the firm's "prompt" and "reasonable" efforts to inform both lawyers and non-lawyers within the firm that the disqualified lawyer may not participate in the matter. New York's Rule also requires a firm to implement "effective screening procedures" to block the flow of information between the disqualified lawyer, and others in that firm.

New York's Rule imposes a reasonableness standard to determine whether representation is permissible despite receipt of disqualifying information. New York's Rule also permits representation despite receipt of disqualifying information if a reasonable lawyer would conclude that the firm can provide "competent and diligent representation in the matter."

Importantly, New York's Rule clarifies what constitutes a "prospective client" by outlining two scenarios where the communication would not form a client-attorney relationship. First, unilateral communication to a lawyer with no reasonable expectation that the lawyer is willing to discuss a potential client relationship does not make someone a "prospective client." Second, communication purposely designed to disqualify the lawyer from handling a "materially adverse representation on the same or substantially related matter" does not make a person a "prospective client."

North Carolina

North Carolina's Rule differs from the Model Rule by not requiring a lawyer who received confidential information to take reasonable measures to avoid additional exposure to more disqualifying information and allowing a disqualified lawyer to be apportioned a part of the fee relating to the matter.

North Dakota

North Dakota's Rule mirrors Sections A-C of the Model Rules. However, Section D of North Dakota's Rule replaces "disqualifying information" with "significantly harmful information" and removes the requirement for informed consent. Additionally, while North Dakota's Rule retains the requirement that prompt notice is given to the client, a disqualified attorney is no longer required to be timely screened from the matter or apportioned no part of the fee.

Ohio

Ohio's Rule mirrors Sections A-C of the Model Rules, but adds language to its version of Section D. For example, Ohio's Rule adds clarifying language that "either of the following applies" after (d) and "both of the following apply" after (d)(2). Despite these minor changes, the substantive effect of these two clarifying phrases is no different from the language of the same Sections under the Model Rule. The balance of the Model Rule's language remains the same.

Oklahoma

Oklahoma's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A, Oklahoma's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Oklahoma maintains the pre-adoption language of "had discussions with" instead of "learned information."

Oregon

Oregon's Rule is substantially similar to the Model Rule but amends Section D by removing the Model Rule's prohibition against a disqualified lawyer being apportioned a part of the fee.

Pennsylvania

Unlike the Model Rule, Pennsylvania's Rule tacks on a requirement before an attorney may use information gleaned from a prospective client. Section B of Pennsylvania's Rule prohibits use of information that "may be significantly harmful" to that prospective client. Section C of Pennsylvania's Rule bars representation where the lawyer "learned" information, and not received information as required under the Model Rule. To conform to the use of the term "learned" above, Pennsylvania, in Sections C and D, have replaced the "received" language to "learned." Pennsylvania's Rule also departs from the Model Rule in one important respect. To permit representation despite the discovery of disqualifying information, the affected or prospective client need not provide written consent. Informed consent, however, is still required. The remainder of Pennsylvania's Rule is largely in conformity with the Model Rule. For example, Section (d)(2) of Pennsylvania's Rule is substantively similar to Model Rule's (d)(2), but does not require the disqualified lawyer to be timely screened from participating in the matter as long as he/she is screened off.

Rhode Island

Rhode Island's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A, Rhode Island's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, Rhode Island maintains the pre-adoption language of "had discussions with" instead of "learned information."

South Carolina

South Carolina's Rule differs from the Model Rule in its variations to Section A. First, South Carolina's Rule uses the pre-Ethics 20/20 language "discuss" instead of "consult." Second, it defines a "prospective client" as being limited to where there is a reasonable expectation that the lawyer is likely to form the relationship.

South Dakota

South Dakota's Rule continues to use the pre-Ethics 20/20 rule. For example, in Section A South Dakota's Rule employs the word "discuss" instead of "consult." Likewise, in Section B, South Dakota maintains the pre-adoption language of "had discussions with" instead of "learned information."

Tennessee

Tennessee's Rule continues to use certain language in the pre-Ethics 20/20 rule. For example, in Section A, Tennessee's Rule employs the word "discuss" instead of "consult." Similarly, in Section B, Tennessee maintains the pre-adoption language of "had discussions with" instead of "learned information." Tennessee's Rule also differs from the Model Rule by allowing a disqualified attorney to be apportioned a part of the fee and requiring the lawyer to return "all papers and property" provided by the prospective client in connection with the potential matter.

Vermont

Vermont's Rule continues to use the pre-Ethics 20/20 rule for certain provisions, but makes certain modifications. First, in Section A, Vermont's Rule uses the word "discuss" instead of "consult." Second, Vermont's Rule requires that the prospective client discuss the possibility of forming a client-lawyer relationship with a lawyer "in good faith." Third and finally, Vermont's Rule permits disclosure of confidential information on compliance with Rule 1.6 in addition to Rule 1.9.

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Virginia

Virginia's Rule continues to use the pre-Ethics 20/20 rule for certain provisions, but makes slight modifications. For example, in Section A, Virginia's Rule uses the word "discuss" instead of "consult." Section B of Virginia's Rule maintains the pre-adoption language of "had discussions with" instead of "learned information." Additionally, Virginia permits representation despite receipt of disqualifying information if the attorney promptly provides the prospective client with a general description of the subject matter on which he is consulted, and the screening procedures employed.

Washington

Washington's Rule is similar to the Model Rule with slight modifications. First, Section B of Washington's Rule conditions disclosure on compliance with either Rule 1.9 or Section E of Rule 1.18. Second, Section C of Washington's Rule conditions representation of a client with interests materially adverse to those of a prospective client on compliance with either Sections D or E of Rule 1.18. Third, Washington includes Limited Legal Technicians ("LLTs")[74] in the scope of its Rule. Fourth, Washington's Rule Section E, which is not contained in the Model Rule. Section E of Washington's Rule defines the scope and impact of a prospective client's informed consent, allowing a lawyer to condition a consultation on the prospective client's informed consent that information disclosed during the consultation would not prohibit the lawyer from representing a different client in that matter. Section E also allows the prospective client to expressly consent to the lawyer's use of any information obtained regardless of whether a client-lawyer relationship materializes.

Wyoming

Wyoming's Rule is substantively the same as the Model Rule, but Section D(1) of Wyoming's Rule requires the client to sign the written confirmation of informed consent.

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This chapter of the AILA Ethics Compendium is written by Sherry K. Cohen and reviewed and produced by the 2017-18 AILA National Ethics Committee (Alan Goldfarb, Chair and Kenneth Craig Dobson, Vice Chair) and the AILA Practice & Professionalism Center.

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[74] Legal Technicians, or Limited License Legal Technicians, are trained and licensed to advise and assist people in family-law related matters. *See* http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians.

American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 3.1
Meritorious Claims and Contentions

Theo Liebmann, Reporter

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MODEL RULE 3.1 MERITORIOUS CLAIMS AND CONTENTIONS

Introduction and Background

Lawyers are ethically obligated to pursue their clients' goals zealously.[1] There are, however, limits on this obligation. A lawyer must be truthful in dealings with other lawyers, other parties, and the court;[2] a lawyer cannot improperly disrupt the legal process;[3] and, a lawyer may not advance frivolous claims, defenses or arguments.[4] This last duty – to ensure that arguments presented to the court have merit – protects the client, the adversary, and the court from spending time and resources on baseless claims. In the immigration context, striking the balance between zealous advocacy and avoidance of frivolous claims is especially charged. Lawyers must find a way to use all arguments ethically available on behalf of clients where the stakes can include family unity, economic security, and even life and death, without using meritless arguments that cause delays and tap client resources in a system where immigration court caseloads have hit record highs, and processing times for immigration applications are often many years.

A lawyer must have a non-frivolous basis for claims both in terms of the legal arguments advanced, as well as for the factual assertions made.[5] Each type of contention – legal argument and factual assertion – requires a different analysis to determine whether it passes ethical muster. For legal argument, a lawyer must inform herself of applicable law and determine whether a good faith argument can be made for the client's position.[6] Notably, this standard provides ample room for arguments that are unlikely to prevail. The mere fact that a lawyer believes the client's argument will fail does not render it impermissible.[7] Nor does the fact that applicable law undermines a lawyer's argument automatically render it unethical, so long as there is a good faith argument for the extension, modification or reversal of the existing law.[8] Instances abound where creative advocacy and challenges to established law have led to significant changes in immigration practice. Marriage between same-sex partners, for example, was only recognized as a basis for a family immigration petition after the Supreme Court decision holding that restricting U.S. federal interpretation of "marriage" and "spouse" to apply only to opposite-sex unions was impermissible.[9] And, for many years, transgender persons were not recognized as members of a "particular social group" in the context of asylum applications; now, some courts have recognized that sexual assaults on a transgendered woman can "undoubtedly constitute persecution."[10] The Rule recognizes that the law's "potential for change" provides lawyers the freedom to test limits and applicability of established law in this manner without fear of crossing ethical lines, so long as there is a good faith basis for the challenge.

[1] *See* MR 1.3 Comment 1 ("A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."); MR Preamble and Scope ¶ 2 ("As advocate, a lawyer zealously asserts the client's positions under the rules of the adversary system.").
[2] *See, e.g.*, MR 3.3 (prohibiting, *inter alia*, false statements to a tribunal, and the presentation of evidence the lawyer knows is false); 4.1 (prohibiting false statements of material fact or law to a third person); MR 8.4 (prohibiting, *inter alia*, conduct involving dishonesty, fraud, deceit or misrepresentation, and conduct that is prejudicial to the administration of justice).
[3] *See, e.g.*, MR 3.4 (prohibiting, *inter alia*, obstruction of another party's access to evidence and the falsification of evidence); MR 3.5 (prohibiting attempts to improperly influence a judge or juror); 4.4 (prohibiting using methods of obtaining evidence that violate a person's legal rights).
[4] MR 3.1.
[5] Id.
[6] MR 3.1 Comment 2.
[7] Id. ("[An] action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail").
[8] MR 3.1 Comment 1 ("the law is not always clear and… account must be taken of the law's ambiguities and potential for change"). *See also* MR 3.3(a)(2) (requiring disclosure to a tribunal of any adverse controlling legal authority).
[9] *United States v. Windsor*, 570 U.S. 744 (2013).
[10] *See Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015); *Hernandez–Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000) (finding that sexual assaults perpetrated against a transgender woman "undoubtedly constitute persecution"), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir.2005).

For factual assertions within claims, lawyers have some leeway as well. A lawyer must inform herself of the facts of the case, but can make assertions that are not fully substantiated if she expects to develop key evidence only through discovery.[11] The lawyer always, however, has the duty to correct any material assertions made either by the lawyer, or through evidence presented by the lawyer, that she later comes to know are false.[12] In immigration practice, gathering supporting evidence for each claim prior to filing a case can often be impractical, if not impossible. Filing deadlines for certain claims pose challenges to a full investigation prior to submitting a claim; and the locus of corroborating evidence for many types of claims is in foreign countries, where procuring it can be a lengthy and often expensive process.

The Rule explicitly recognizes that lawyers for clients in proceedings that could result in incarceration may have more latitude. Lawyers in those contexts, for example, still have the duty to require that the opposing side prove every element of their case.[13] A lawyer defending a permanent resident client at a bond hearing where the government has the burden of proof, for example, has the duty to advance arguments that the government has not shown the client is a flight risk or a danger to the community, even where the lawyer knows of evidence indicating her client is unlikely to return to court.[14] And the Rule notes that, in criminal matters, the lawyer's obligations under federal or state constitutional law may require the lawyer to present claims that would otherwise be prohibited.[15]

Of course, regardless of the type of case – criminal, civil, immigration – the duty to be a zealous advocate should not be compromised. Lawyers have a duty to "use legal procedure for the fullest benefit of the client's cause," so long as they stop short of "abusing" the law.[16] Understanding where "use" becomes "abuse," and where "zealous" becomes "frivolous," are nuanced determinations. Making that distinction effectively is crucial not just for compliance with Rule 3.1, but also for compliance with rules from a variety of other sources.

- The Federal Rules of Civil Procedure subjects lawyers in federal court to sanctions if they submit a filing that, among other things, presents claims that are not warranted by existing law or a non-frivolous argument for extending, modifying or reversing existing law, or the establishment of new law; makes factual contentions that do not have evidentiary support; denies factual contentions that are warranted by evidence; or presents claims that have an improper purpose such as harassment or unnecessary delay.[17]

- Under the Code of Federal Regulations, it is deemed in the public interest for an adjudicating official or the Board of Immigration Appeals to impose disciplinary sanctions against any practitioner who engages in frivolous behavior in a proceeding before an immigration court, the Board, or any other administrative appellate body under title II of the Immigration and Nationality Act. Sanctions may only be imposed where the practitioner knows or reasonably should have known that her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary

[11] MR 3.1 Comment 2 ("The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery.").
[12] MR 3.3(a) (a lawyer cannot knowingly "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;" and, if a lawyer, the lawyer's client, or a witness called by the lawyer "has offered material evidence and the lawyer comes to know of its falsity," the lawyer must take reasonable remedial measures.)
[13] MR 3.1 ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.").
[14] *See, e.g., Casas-Castrillon v. DHS*, 535 F.3d 942 (9th Cir. 2008) (placing burden on government in bond hearing for permanent resident who had been detained for seven years).
[15] MR 3.1 Comment 3. *See infra* for further discussion.
[16] MR 3.1 Comment 1. *See generally* Elizabeth Keyes, *Zealous Advocacy: Pushing Against the Borders in Immigration Litigation*, 45 SETON HALL L. REV. 475 (arguing that immigration lawyers, like criminal defense lawyers, owe a heightened duty of zealousness to their clients).
[17] FED. R. CIV. PRO. R. 11(b).

delay.[18] By signing a filing, application, motion, appeal, brief, or other document, the practitioner certifies that he or she has read the document, and that, to the best of his or her "knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose."[19]

- A variety of other federal rules authorize sanctions for frivolous claims on appeal, or for "vexatious" or "unreasonable" litigation generally.[20]

In addition to potential ethical violations, lawyers also have to be concerned about the possibility of financial costs to making non-meritorious claims. Each of the federal rules cited above come with the possibility of financial sanctions, and most state jurisdictions also have rules authorizing such sanctions.[21] A few jurisdictions even recognize standing for various tort-based claims against lawyers who make non-meritorious claims or otherwise abuse the litigation process.[22]

A. Text of Rule

ABA Model Rule 3.1 – Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment—Model Rule 3.1

[1] The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

[2] The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

[18] Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. 8 C.F.R. § 3.102(j)(i).
[19] 8 C.F.R. § 1003.102(j).
[20] FED. R. APP. PROC. R. 38; 28 USC § 1912; 28 USC § 1927.
[21] *See, e.g.*, 22 NYCRR 130-1.1; CA. CIV. PRO. §128.5; TX. R. RCP R. 13; MN ST §549.211; GA ST §9-15-14. Note also that federal courts have inherent authority to sanction parties for misconduct even outside of rules of procedure or statutory provisions. In *Chambers v. Nasco, Inc.*, 501 U.S. 32 (1991) the Supreme Court ruled that federal courts have inherent power to impose sanctions on litigants for bad faith conduct even when the conduct is not specifically covered by rules of procedure or statutory provisions.
[22] *See infra*, at n. 66 and accompanying text.

[3] The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

Selections from Other Relevant Rules

Federal Rule of Civil Procedure Rule 11(b)

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

28 USC 1927—Counsel's liability for excessive costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

8 CFR §1003.102(j)(1)

A practitioner engages in frivolous behavior when he or she knows or reasonably should have known that his or her actions lack an arguable basis in law or in fact, or are taken for an improper purpose, such as to harass or to cause unnecessary delay. Actions that, if taken improperly, may be subject to disciplinary sanctions include, but are not limited to, the making of an argument on any factual or legal question, the submission of an application for discretionary relief, the filing of a motion, or the filing of an appeal. The signature of a practitioner on any filing, application, motion, appeal, brief, or other document constitutes certification by the signer that the signer has read the filing, application, motion, appeal, brief, or other document and that, to the best of the signer's knowledge, information, and belief, formed after inquiry reasonable under the circumstances, the document is well-grounded in fact and is warranted by existing law or by a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, and is not interposed for any improper purpose.

Federal Rules of Appellate Procedure Rule 38—Frivolous Appeal

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

B. Annotations and Commentary

Determining Whether a Claim is Frivolous

Neither the Model Rules nor the comments to the Rules define "frivolous." And although Rule 3.1 does require that a lawyer determine that she can make a "good faith argument" in support of the client's position, no bright line is laid out, and no factors are listed. [23] Numerous commentators and cases, however, do provide helpful guidance.

The Restatement defines a frivolous claim as one that is "so lacking in merit that there is no substantial possibility that the tribunal would accept it."[24] Another common standard is that a claim becomes frivolous where there is "less than a *de minimis* chance of success."[25] This standard is generally perceived as an objective one (would a ***reasonable*** lawyer think the claim had merit?), rather than a subjective one (did ***this*** lawyer think the claim had merit?).[26]

> *Example: Lawyer represents Client in a State juvenile court dependency proceeding. During the course of the proceeding, Lawyer moves for an order that will establish Client's eligibility for Special Immigrant Juvenile Status (SIJS), a form of immigration relief only available to certain minors under 21 who cannot reunify with one or both parents due to abuse, neglect, abandonment, or a similar basis under State law.[27] Lawyer claims Client cannot reunify with Client's parents, in spite of the fact that Client lives with both of them. Even if Lawyer made the legal claim due to a misreading of the statute, it will constitute a frivolous claim because there is no substantial possibility the court will accept it.[28]*

In practice, a critical course of action, in addition to diligent research into existing statutory and case law, is for a lawyer to confer with experienced colleagues whose judgment the lawyer respects on the question of whether a claim has a conceivable chance of being accepted, either in the case itself or on appeal. Ultimately, though, lawyers are obligated to undertake some form of preliminary investigation into clients' intended claims and contentions.[29]

When the question of whether a claim is frivolous arises in the context of appeals, lawyers must decide which, if any, bases for a decision constitute arguable error. For the most part, as with initial claims, courts have found that

[23] MR 3.1 Comment 2.
[24] Restatement (Third) of Law Governing Lawyers §110 cmt. d (2000).
[25] Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L. Rev. 671 (1997). *See, e.g., Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999) ("There is a significant difference between making a weak argument with little chance of success… and making a frivolous argument with no chance of success…"); *Hackman v. Valley Fair*, 932 F.2d 239, 243 (3rd Cir. 1991) (submission of weak argument is generally not bad faith, though it may be poor judgment).
[26] *See generally* Restatement (Third) of Law Governing Lawyers §110 cmt. d (2000) (a position that "a lawyer of ordinary competence" would recognize as meritless is a frivolous one); ABA Center for Professional Responsibility, A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2005, p. 423 (2006) ("the test in Rule 3.1 is an objective test"); 2 Hazard, Hodes & Jarvis, The Law of Lawyering (4th ed. 2014) §27.12 ("Rule 3.1 adopts an objective as opposed to a subjective standard.")
[27] 8 USC §1101(27)(J).
[28] Note that if Lawyer is intentionally pursuing a ***good faith*** argument for a modification or extension of the SIJS law, the argument will not be deemed frivolous. *See infra*.
[29] *See, e.g., Jorgensen v. Taco Bell Corp.*, 58 Cal. Rptr. 2d 178, 181 (Cal. Ct. App. 1996) ("Frivolous litigation is frequently avoided by a careful lawyer's investigation of a client's claims before filing suit."); *Idaho State Bar v. Hawkley*, 92 P.3d 1069, 1074 (2002) (calling a lawyer's pre-suit investigation "trivial" in concluding that lawyer violated Rule 3.1); *Hunt v. Dresie*, 740 P.2d 1046, 1053 (Kan. 1987) ("It is obvious that the client must rely upon his lawyer to make a reasonable investigation of his case. Likewise, the attorney must accept the obligation to conduct a reasonable investigation in an attempt to find what the true facts are before filing a civil action on behalf of his client.").

an appeal is frivolous if it is completely meritless from the perspective of a "reasonable" lawyer.[30] But even where a claim was not frivolous in an original filing, if the original court has made a sound and clear legal determination that is left unaddressed by the appellant, the lawyer risks a finding by the appeals courts that repeating the claim is frivolous.[31]

Example: Lawyer represents Client at an asylum hearing. Immigration Judge issues a clear determination that Client was not credible, and supports the determination with numerous references to significant inconsistencies in the record. Lawyer then appeals to the Board of Immigration Appeals, but merely repeats the arguments made to Immigration Judge without addressing the credibility determination. Even though the original claim may not have been frivolous, the claim on appeal very likely will be, because it does not address the basis for the denial.

Malicious Intent and Harassment

Rule 3.1 is essentially a strict liability rule; a lawyer violates the rule with a frivolous argument whether or not she believes it is frivolous, and regardless of her motivation. But while the intent of the lawyer in filing the claim is no longer part of the Model Rule or commentary,[32] many states continue to have malicious intent either incorporated into their version of the rule, or listed as an additional ground for finding a claim to be a violation of Rule 3.1.[33] Typically, states that include these intent grounds prohibit claims filed with "malicious intent or merely to harass."[34] Further, several states also have their own equivalent of Federal Rule 11, prohibiting non-meritorious claims, and explicitly including claims filed with malicious intent.[35] Even in these jurisdictions, however, a violation of the basis of malicious intent or harassment is usually found only where the claim also lacked merit.

Example: Lawyer files a petition for an order of protection in a state court in order to help establish a basis for Violence Against Women Act (VAWA) eligibility for Client. The facts in the petition, however, do not support the claim of domestic violence under the state's law. In a state that requires intent to harass or malice to establish that a claim is frivolous, there will not be a violation based on these facts alone.[36] In a state without the intent requirement, the fact that there is "less than a de minimis" chance of success would render this claim frivolous.

"Good Faith" Arguments for Extension, Modification, or Reversal of Existing Law

[30] *E.g. Hilmon Co. v. Hyatt Int'l*, 899 F.2d 250 (3rd Cir. 1990).
[31] *Clark v. Maurer*, 824 F.2d 565 (7th Cir. 1987) (the facts and law "as known to [client and counsel] by reasonable research, might make a suit colorable when filed; but when the district court dismisses the suit, the plaintiff and his lawyer must reassess its merits"). Note that where the issue is one of first impression in one circuit, the fact that there is adverse authority in other circuits does not render the claim frivolous. *DiGianni v. Stern*, 26 F.3d 346 (2nd Cir. 1994).
[32] Prior to 2002, Rule 3.1 included a comment that an action was frivolous if "client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person." MR 3.1 Comment 2 (1983) (superseded).
[33] *See infra*, State Variations.
[34] *Id.* Even for states that do not have explicit language regarding intent in their version of Rule 3.1, many other rules contain language that relate to various types of claims filed with bad intentions, including: Rule 3.2 (relating to improperly delaying proceedings); Rule 3.3 (relating to false statements of law or fact to a tribunal, and failure to disclose adverse controlling authorities); Rule 3.4 (relating to frivolous discovery requests, or refusal to comply with discovery; and alluding to irrelevant matters at trial); Rule 4.4 (relating to using methods in the course of representation that are solely for the purpose of embarrassing or burdening a third person); Rule 8.4 (relating to conduct "prejudicial to the administration of justice" generally); 3.8 (relating to behavior of prosecutors, where charge must be supported by probable cause).
[35] *See, e.g.*, 22 NYCRR 130-1.1; CA. CIV. PRO. §128.5; TX. R. RCP R. 13; MN ST §549.211; GA ST §9-15-14.
[36] There could be a violation of other rules, including the state's equivalent of FRCP 11.

Although Rule 3.1 prohibits frivolous claims, it explicitly allows for claims where there is a good faith argument for the extension, modification or reversal of existing law.[37] The key factors in assessing whether such an argument is a "good faith" one are the strength of the existing law, whether there has been a change in the adjudicating body, any new authority which supports the argument, the decisiveness of the adverse law, a change in composition of the court hearing the argument, the passage of time, or other similar reasons the likelihood of success has changed.[38]

> *Example: A decade-old 2-1 decision from Federal Circuit Court "A" ruled that police collaborators in Country X are not a "particular social group" meriting asylum protection. Since the decision, two other Federal Circuits have found that police collaborators in Country X* ***do*** *constitute a "particular social group." Filing a claim in the jurisdiction of Circuit A will not to be deemed frivolous, in spite of adverse controlling law on point, due to the passage of time and new authority which supports a change in Circuit A's interpretation.*

The Duty to Investigate Facts

Rule 3.1 requires claims have a non-frivolous basis in fact, as well as in law. That requirement encompasses a duty to undertake some investigation of the facts of the client's case before making a claim.[39] While lawyers must "inform themselves about the facts of their clients' cases," the facts do not necessarily have to be "fully substantiated" prior to making a claim.[40]

As an initial matter, and perhaps obviously, a lawyer should first discuss any factual claim with her client before asserting it in a proceeding.[41] After that basic step, a number of other considerations come into play. First, the more significant the fact, the less forgiving courts are of a failure to investigate. For example, a lawyer's failure to investigate whether clients were exposed to a chemical in a chemical products liability case rendered that claim frivolous, as did a lawyer's failure to investigate whether the defendant doctor in a medical malpractice suit was the same doctor identified in the client's medical records.[42] Second, if a client's factual claims contradict other credible evidence, or the client has "shifting narratives," the lawyer is more likely to be found to have conducted insufficient factual investigation.[43] And finally, the more obviously false the factual claim, the more likely a violation will be found.[44]

> *Example: Client in an asylum case tells her Lawyer that she is a member of persecuted political group A in her home country. Lawyer conducts some research, and finds no evidence that the political group A exists. Client then tells Lawyer that Client is actually a member of political group B. Lawyer finds no*

[37] MR 3.1.
[38] Restatement (Third) of Law Governing Lawyers §110 cmt. d (2000). *See also In re Richards*, 986 P.2d 1117 (N.M. 1999) ("[A] case upon which a lawyer relies to argue for the extension, modification, or reversal of existing law, must say what the lawyer says it says. Moreover, when relying upon an exception to a general rule of law, the position the lawyer asserts must either come within the exception, or provide a cogent argument for broadening the exception."); *Toledo Bar Ass'n v. Rust*, 921 N.E.2d 1056 (Ohio 2010) ("the fact that [lawyer] had [prior to filing suit] some arguably viable legal support for his actions is enough to avoid disciplinary sanction"); *In re Boone*, 7 P.3d 270 (Kan. 2000) (fact that lawyer failed to make good-faith argument for extension of existing law to trial court, resulting in dismissal, demonstrated that lawyer filed frivolous case despite lawyer's subsequently making such argument to disciplinary panel).
[39] MR 3.1 Comment 2 (lawyers are required to "inform themselves about the facts of their clients' cases").
[40] Id.
[41] *See, generally*, MR 1.4 (requiring lawyers to consult with clients on goals of representation and means by which they are pursued).
[42] *In re Zohdy*, 892 So. 2d 1277 (La. 2005); *Weatherbee v. Va. State Bar*, 689 S.E.2d 753 (Va. Ct. App. 2010).
[43] *E.g. In re Olsen*, 326 P.3d 1004 (Colo. 2014).
[44] *In re Panel Case No. 17289*, 669 N.W.2d 898 (Minn. 2003) (lawyer sanctioned where client claimed that bullets were fired into car, and lawyer could have determined falsity of that claim merely by looking at the car).

evidence that political group B is a persecuted group, and Client is unable to provide any details on nature of persecution. The combination of Client's shifting claims and lack of any details of persecution make it likely that filing an asylum claim based on Client's membership in political group B would violate 3.1.

The Rule does allow for the fact that, at times, there may not be sufficient time or ability to substantiate facts more fully before making a claim. For example, if a statute of limitations deadline is rapidly approaching, or if key facts can only be determined through discovery, or if some other emergency situation exists, additional leeway is given.[45]

Example: Lawyer files a motion for a bond hearing for detained Client. Lawyer, relying on Client's account, concedes in the motion that Client has two arrests for misdemeanor possession of marijuana, but claims that Client has no other criminal history. Lawyer attempts to do a criminal history check to confirm Client's claims of minimal criminal history, but the results are not provided prior to the court date. At the court date, the ICE attorney submits to the Court a rap sheet for Client that includes an armed robbery arrest in a different state. Because the lawyer attempted to verify the information provided by Client, but was not able to prior to the Court date, there would be no violation of Rule 3.1.[46]

Additional Leeway for Lawyers of Clients at Risk of Incarceration

Rule 3.1 provides that lawyers for clients in any proceeding that could result in incarceration may "so defend the proceeding as to require that every element of the case be established."[47] On its face, this portion of the rule permits lawyers representing clients at risk of incarceration to advance a defense that a particular element has not been established by the opposing party, even where the lawyer knows of facts that do satisfy that element. For example, a lawyer for a client in an intent crime may file a motion to dismiss, claiming that the government has not alleged intent, even where the lawyer knows from the client that the crime was committed with intent. But if that were all the Rule stood for, it would not establish any different criteria for lawyers defending clients at risk of incarceration as for lawyers defending any claim. Lawyers defending a personal injury suit, for example, are of course entitled – and even obligated – to argue that facts establishing an element of the tort were not established.

The incarceration provision therefore must do more than that. And in fact, the commentary to the Rule explicitly allows the lawyer to present a claim or contention "that otherwise would be prohibited by this Rule."[48] Commentators have interpreted this additional leeway to create a higher bar to establish a claim as frivolous, and some courts do seem to show greater forbearance in imposing sanctions for frivolous claims in criminal matters.[49] A claim that, in a non-incarceration context, might fall below the "greater than a *de minimis* chance of success" standard, may therefore not warrant sanctions in the criminal defense context so long as it is not, for example, "patently absurd."[50] The line between "frivolous" and a standard such as "patent absurdity" is not clearly delineated

[45] MR 3.1 Comment 2 ("a claim is not frivolous merely because… the lawyer expects to develop vital evidence only by discovery"); Or. Ethics Op. 2005-59 (2005); Neb. Ethics Op. 08-03 (2008); Ga. Ethics Op. 87-5 (1988).
[46] Note that the strategic question of whether to proceed prior to having the full criminal history is a different, though also important, question. In addition, there are MR 3.3 (Candor toward the Tribunal) considerations here. *See infra* for a chart comparing MR 3.1 and MR 3.3.
[47] MR 3.1.
[48] MR. 3.1 Comment 3.
[49] *E.g. U.S. v. Figueroa-Arenas*, 292 F.3d 276. 277 (1st Cir. 2002) ("taking direct account of the need to assure robust advocacy in criminal matters, we find no legally sufficient basis for the imposition of sanctions…"; *In re Becraft*, 885 F.2d 547, 548-9 (9th Cir. 1989) (imposing sanctions only because defense lawyer raised argument that was a "patent absurdity" and had previously been found to be "utterly without merit."); *See also* Freedman, *The Professional Obligation to Raise Frivolous Issues in Death Penalty Cases*, 31 Hofstra L. Rev. 1167 (2003); D.C. Ethics Op. 320 (2003) (3.1 provides some basis for jury nullification argument by defense counsel).
[50] *In re Becraft*, 885 F.2d 547, 548-9 (9th Cir. 1989).

in case law or elsewhere, but repeatedly making an argument deemed to have no merit, or showing other "bad faith," are factors courts have relied on in finding that criminal defense attorneys should be sanctioned.[51]

While there is robust commentary, and evidence in the case law, that judges grant this additional leeway in criminal defense matters, there is no indication of how judges might react when the incarceration risk comes in a legal proceeding other than a criminal matter. The Rule clearly extends the leeway to any proceedings that "could result in incarceration." In the immigration context, that could mean a proceeding that could result in the detention of the client, such as a bond hearing. It could arguably also mean a political asylum case where return to the client's home country will almost certainly lead, among other things, to the client's incarceration.

> *Example: At a bond hearing, the Immigration Judge determines that Client is a flight risk based on a previous failure to appear for a criminal matter and denies bond. A month later, Lawyer files a successive bond application based on a "material change of circumstance," though the only change the Lawyer can cite is that a month has passed and the client is now "more likely to understand the importance of appearing in court." Such an argument might be deemed to have less than a de minimis chance of success, but arguably still not result in sanctions because the consequences to the Client include ongoing incarceration.*

It is imperative to note that, regardless of whether there is additional leeway in these situations under Rule 3.1, there is no incarceration provision under 8 CFR §1003.102(j)(1), and so what might not be a violation under 3.1 could nevertheless result in significant sanctions.[52]

Do Matters Before USCIS Constitute "Proceedings"?

Rule 3.1 prohibits non-meritorious claims in "proceedings."[53] For immigration practitioners, there is no doubt that matters before courts, including the Immigration Court, constitute legal proceedings as contemplated by the Rule.[54] While it is perhaps less obvious, filings with the U.S. Citizenship and Immigration Services (USCIS) also likely fall under Rule 3.1.[55]

With respect to agencies such as the IRS or Department of Education, and in the context of a federal law prohibiting obstruction of agency proceedings, courts have determined that the term "proceeding" simply means "proceeding in the manner and form prescribed for conducting business before the department or agency, including all steps and stages in such action from inception to conclusion."[56] Courts have explicitly included agency

[51] *E.g. U.S. v. Greenwood, 967 F.2d 589* (9th Cir. 1992); *In re Becraft*, 885 F.2d 547, 548-9 (9th Cir. 1989).
[52] *See chart infra* for a comparison of applicability and sanctions for different rules related to meritorious claims.
[53] MR 3.1. As with the duty of candor toward a tribunal under Rule 3.3, context is significant. *See* the Compendium chapter on Model Rule 3.3 for a detailed analysis of what constitutes a "proceedings before a tribunal" for purposes of the candor duty. *See also* NYSBA OP. 1011 (7/19/14) (finding that applications to USCIS do not constitute adjudicative proceedings before a tribunal for purposes of MR 3.3); AILA ETHICS PRACTICE ADVISORY NO. 16110105 (11/1/16) (urging lawyers to treat the USCIS asylum offices as tribunals for purposes of MR 3.3).
[54] 8 C.F.R. § 1003.101.
[55] As noted *supra*, under 8 C.F.R. §§ 292.3 and 1003.102(j)(1), officials at the Department of Homeland Security have the authority, independent of other ethical rules, to discipline lawyers who submit non-meritorious claims to USCIS. In addition, asylum applications specifically include the following language regarding additional civil and criminal penalties for any "preparer" of the I-589 form above the signature line – "I am aware that the knowing placement of false information on the Form I-589 may also subject me to civil penalties under 8 U.S.C. 1324c and/or criminal penalties under 18 U.S.C. 1546(a)."
[56] *See* 18 U.S.C. § 1505 (federal statute prohibiting "Obstruction of proceedings before departments, agencies, and committees"); *Rice v. U.S.*, 356 F.2d 709 (8th Cir. 1966). *See also United States v. Browning, Inc.*, 572 F.2d 720, 724 (10th Cir.), *cert. denied*, 439 U.S. 822, 99 S.Ct. 88, 58 L.Ed.2d 114 (1978) ("In sum, the term "proceeding" is not, as one might be inclined to believe, limited to something in the nature of a trial. The growth and expansion of agency activities have resulted in a meaning being given to "proceeding" which is more inclusive and which no longer limits itself to formal activities in a

adjudications and agency investigations, including determinations by individual representatives of agencies, among those "steps and stages" that are considered part of a "proceeding."[57] For immigration lawyers, those "steps and stages" include filings with USCIS where the lawyer has entered a G-28 for the particular application, including those submitted by the client with the lawyer simply designated as a "preparer."[58] A letter, brief or affirmation written and signed by the lawyer, where the lawyer makes legal and factual claims – for example, in response to a Request for Evidence or Notice of Intent to Deny, or as part of a submission to the Administrative Appeals Office – also fall under the purview of Rule 3.1 if the same definition of proceeding is applied.

Candor Toward the Tribunal (3.3) vs. Meritorious Claims (3.1)

Rule 3.1 and Rule 3.3 both contain guidance relating to claims made in legal proceedings.[59] The following chart summarizes significant similarities and differences.

	Rule 3.1	**Rule 3.3**
Context where rule applies	Applies in all "proceedings"	Applies only in "proceedings before a tribunal"
Legal claims	Prohibits bringing claims that do not have a non-frivolous basis in law, or a good faith argument for modification, extension or reversal of law	Prohibits false statements of law; and requires disclosure of adverse controlling legal authority, if not disclosed by opposing counsel
Factual assertions	Prohibits bringing claims where factual assertions have no non-frivolous basis	Prohibits false statement of fact by lawyer, and offering evidence lawyer knows is false, regardless of whether statement or evidence is "material"
Knowledge	Lawyers' "knowledge" of non-meritorious nature of claim not required for violation of Rule	Lawyer must "know" of claim's falsity for violation of Rule
Remediation	Though no remediation requirement explicitly mentioned, immediate withdrawal of claim required to avoid ongoing violation	"Remedial measures," including possible disclosure to tribunal, required to correct false statements of material fact or law by lawyer, or false evidence offered by lawyer
Criminal proceedings reference	Lawyer may defend proceedings that could result in incarceration so as to require every element of case be established	Lawyer may not refuse to offer testimony of defendant in criminal matter where lawyer only "reasonably believes" testimony is false

court of law"); *United States v. Fruchtman*, 421 F.2d 1019 (6th Cir.1970), *cert. denied*, 400 U.S. 849, 91 S.Ct. 39, 27 L.Ed.2d 86 (1970) (Federal Trade Commission investigation deemed a "proceeding"); *United States v. Sutton*, 732 F.2d 1483 (10th Cir.1984) (investigation by Department of Energy deemed a "proceeding").

[57] *Id. See United States v. Fruchtman*, 421 F.2d at 1021 (rejecting contention that the word 'proceedings' refers only to those steps before a federal agency that are juridical or administrative in nature).

[58] *See* 8 C.F.R. § 1001.1(k) (equating preparation with "practice").

[59] For a full discussion of Rule 3.3, *see* Ethics Compendium Chapter 3.3.

Sanctions

Sanctions vary widely for violations of the various rules that relate to frivolous claims. Generally, however, the intent and impact of misconduct are key factors in determining the level of sanction.[60] The chart below illustrates the applicability of the various rules, as well as the range of sanctions available and standards used.

	Model Rule 3.1	**FRCP Rule 11(c)**	**8 CFR §1003.101**	**FRAP Rule 38; 28 USC 1912, 1927**
Applicability	All legal proceedings	Proceedings before United States District Court	Proceedings before Board of Immigration Appeals; Immigration Court; Department of Homeland Security	Proceedings before Federal Appellate Courts and Supreme Court
Type of Sanctions Permitted	Not specified; dependent on jurisdiction[61]	Nonmonetary directives; penalty to court; reasonable attorney's fees and other expenses directly resulting from violation[62]	Permanent disbarment; suspension; censure (public or private); other action deemed "appropriate" by BIA	Damages and single or double costs, including attorney's fees and other expenses
Standard for Determining Severity of Sanction Imposed	Dependent on jurisdiction[63]	Sanction necessary to "deter repetition of conduct or comparable conduct by others similarly situated"	Sanction necessary to "serve the public interest"	Discretion of court
Who Pays Monetary Sanctions?	N/A	Lawyer, client, or both	N/A	Lawyer, client, or both

[60] *See, generally*, ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 6.2 (1991) (suggesting sanction of disbarment where lawyer knowingly violates rule and causes ***serious*** injury; suspension where knowing violation caused injury; reprimand where violation was negligent rather than intentional; and admonition where one isolated instance of violation by lawyer caused little or no actual injury).
[61] *Compare In re Thomas*, 668 N.Y.S.2d 14 (N.Y. App. Div. 1998) (multiple violations of rule led to public censure by New York disciplinary authority), *with Iowa Supreme Court Bd. Of Prof'l Ethics & Conduct v. Ronwin*, 557 N.W.2d 515 (Iowa 1996) (Iowa disciplinary authority disbars lawyer for multiple instances of frivolous claims).
[62] There are some limitations on the court's latitude to impose reasonable attorney's fees and expenses. *See* Fed.R.Civ.Proc. Rule 11(d).
[63] For a model set of standards, *see* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS § 6.2 (1991) (identifying lawyer's intent and impact of misconduct as primary considerations in determining severity of sanction for violation of ethical rule).

As noted in the chart above, violations of Federal District and Appellate Courts under FRCP 11, FRAP 38 can result in monetary sanctions to the lawyer, the client, or both. That potential monetary liability for both lawyer and client creates its own ethical challenges. As a general matter, a monetary sanction is imposed on the person primarily responsible for the violation and will be apportioned if both the lawyer and client bear some responsibility.[64] Things get trickier where the lawyer and client must decide how to apportion the sanctions, or where that issue is addressed in the initial retainer agreements. In general, ethics committees and other guidance take a strongly negative view of any attempt by a lawyer to shift responsibility for sanctions to a client, especially before the litigation has concluded.[65] The preferred approach is to have a neutral arbiter determine apportionment after all litigation has ended, in order to avoid any conflict of interest problems.[66]

Lawyers who make frivolous claims can also find themselves subject to liability in a variety of civil actions brought by an opposing party. Although courts are wary of such suits, aggrieved parties have found some very limited success under malicious prosecution and abuse of process causes of action.[67]

C. Hypotheticals

Hypothetical One:

Client Corina meets with Attorney Alex to discuss her immigration case. Corina tells Alex that she is in desperate need of a work authorization card, and that she also wants to acquire permanent resident status. Corina says she was the victim of female genital mutilation (FGM) in her home country of Gambia. She says that she entered the U.S. on a tourist visa 20 years ago, but overstayed the visa. Corina has a 19-year-old son who is a U.S. citizen, and who has a rare medical condition that requires Corina's constant attention. Corina states that she became pregnant with her son as the result of a violent rape in Gambia, and that shortly after she entered the U.S., she experienced issues with her pregnancy that required constant bed rest. Corina says that after her son was born, she struggled financially and mentally with the medical challenges of raising her son on her own. Corina also tells Alex that she is gay and fears returning to Gambia based on her FGM and the harm that would come to her if anyone knew she was gay. Corina says that she has never applied for asylum.

Attorney Alex believes that despite Corina's long residence in the United States, she has a bona fide claim for asylum. However, he is concerned because an asylum application must be filed within one year of a person's entry into the U.S. unless the person can show extraordinary circumstances or a change in country conditions. Alex also knows that Corina has an excellent claim for cancellation of removal as a non-permanent resident, based on the exceptional and extremely unusual hardship to her U.S. citizen son. He knows that in order to get Corina into removal proceedings so that he can make a claim for cancellation, he would have to file an asylum claim so that her case could be referred to the Immigration Court.

Alex is concerned about attorneys being disciplined for filing frivolous asylum claims to get their clients into removal proceedings for cancellation of removal claims. He decides against informing Corina about the possibility

[64] FRCP 11(c)(1); *M.E.N. Co. v. Control Fluidics Inc.*, 834 F.2d 869 (10th Cir. 1987).
[65] Restatement (Third) of Law Governing Lawyers §110 cmt. g (2000) (best approach is to leave questions of sanctions responsibility until after proceedings are concluded); California Ethics Op. 1997-151 (1997) (any agreement during course of litigation regarding sanctions should be limited addressing issues after litigation concluded); N.Y. City Ethics Op. 1989-3 (lawyer may not make agreement with client that client will reimburse lawyer for court-ordered sanctions).
[66] Id.
[67] *E.g. Seltzer v Morton*, 154 P.3d 561 (Mont. 2007) (upholding multi-million dollar award against firm in malicious prosecution and abuse of process claims for filing meritless action). Conversely, a lawyer is not likely to be found liable to a client for failure to pursue a claim that the lawyer mistakenly found did ***not*** have merit if reasonable lawyers could differ, the lawyer advised the client of the lawyer's position, and the lawyer gave the client the opportunity to seek new counsel who might pursue the claim. *Mills v. Cooter*, 647 A.2d 1118 (D.C. 1994).

of cancellation of removal. Alex ends up just explaining why an asylum claim is time-barred, and never discusses the possibility of cancellation of removal.

Could Alex have filed the asylum claim? Should he have filed it?

Analysis

Alex not only could have filed Corina's asylum claim, he should have more fully investigated the factual background of the claim, and then given his client fully informed counseling, so that she could make an informed decision about pursuing the asylum and cancellation claims.

Meritorious claim

Corina presented facts that laid out a meritorious asylum claim. While Alex is correct that there is a filing deadline issue, Corina's statements to Alex indicate a strong possibility that she could qualify for an "extraordinary circumstances" exception to the one-year filing deadline. The fact that Corina has a severely disabled son and is a single mother struggling financially establishes a basis for a non-frivolous claim to qualify for the exception.[68]

If this were less clearly a meritorious claim for asylum, but really just an avenue to get a work authorization card or to be referred for a strong cancellation of removal case, then the situation is different. Alex would need to concern himself with two rules – Rule 3.1 and 8 CFR §1003.102(j)(1). Both rules prohibit filing claims that have no merit, and the CFR also prohibits claims that are filed for an "improper purpose, such as to harass or cause unnecessary delay." Under Rule 3.1, a non-meritorious claim is one that does not have even a *de minimis* chance of success;[69] under the CFR, a non-meritorious claim is one that lacks an "arguable basis in law or in fact." The ethical propriety of an asylum claim in Immigration Court will be measured under those two standards. For example, if there were no merit to the asylum claim (e.g no non-frivolous argument for an extraordinary circumstance or changed country conditions exception to the filing deadline) then both rules would be violated. As noted elsewhere in this chapter, one of the smartest practices a lawyer can utilize to ascertain whether a claim meets these standards is consultation with other experienced practitioners whose judgement the lawyer respects.

Competence & Diligence

The real problem for Alex here, however, is not a meritorious claim issue, but rather the thoroughness of his investigation to determine the merit of a claim for a filing deadline exception. Where Rule 3.1 cautions a lawyer to conduct sufficient factual investigation to ensure she does not file a frivolous claim,[70] Rule 1.1 and 1.3 require a lawyer to conduct sufficiently diligent inquiry into the factual background of a problem in order to represent a client competently.[71] Here, not only has Alex clearly not sufficiently investigated whether Corina's situation could qualify for an extraordinary circumstances exception to the filing deadline, he also has not taken any steps at all to investigate whether there might be a changed country conditions exception.

[68] *See* 8 CFR 208.4(a)(5)(i) ("serious illness or mental or physical disability including any effects of persecution or violent harm suffered in the past, during the 1-year period after arrival"). There could also be a changed circumstances argument under 8 CFR 208.4(a)(4)(i) relating to Corina being gay.
[69] Unless the lawyer is making a good faith argument for the modification, extension, or reversal of existing law. *See supra*.
[70] Rule 3.1 cmt. 2.
[71] Rule 1.1 cmt. 5; Rule 1.3 cmt. 1.

Communication

In addition, Alex also has a problem on his hands for not adequately communicating with his client. He has not discussed the filing deadline exceptions with Corina, and he has not even mentioned the cancellation of removal claim. Lawyers are required to explain matters to their clients so the clients can make informed decisions.[72] Alex should have discussed the possibility of cancellation of removal as an option for Corina, especially due to the short timeline for that claim, given the age of her son; he should have informed her that if she were going to file an asylum claim, it should be done quickly; and he should have informed her of the challenges in her asylum claim so that, even if he were not to take the case, she would understand her options as she decided whether or not to proceed *pro se* or seek alternate counsel. If the claim were not meritorious, of course, and there was no good faith basis to change, modify or reverse the law, then there would be no obligation to cover that option with the client.

Hypothetical Two:

Cal hires attorney Atticus to file an N-400 application for citizenship on his behalf. Atticus prepares the N-400, and he and Cal review it together. At Cal's direction, Atticus checks the "no" box in response to Part 12, question 23 ("Have you EVER been arrested, cited, or detained by any law enforcement officer (including any immigration official or any official of the U.S. armed forces) for any reason?"), and question 24 ("Have you EVER been charged with committing, attempting to commit, or assisting in committing a crime or offense?"). Atticus files the application, and after several months, Cal receives his interview notice. Cal meets with Atticus to prepare for the interview. During the meeting, Cal informs Atticus that he is not quite sure if he answered the Part 12 questions correctly. Cal says that he was previously arrested by the FBI for violating federal law related to currency transactions. Atticus asks Cal what happened. Cal replies that on several occasions, he brought more than $10,000 into the U.S. without reporting it, and at one point he was arrested. Cal says that his criminal lawyer had gotten the case dismissed because of "some technicality," and had even gotten his arrest record sealed. When Atticus asks Cal why he had not mentioned this before signing the N-400, Cal says his criminal lawyer had said that Cal never had to disclose it to anyone since it was sealed.

Has Atticus violated Rule 3.1 by filing the N-400?

Analysis

There was no violation of Rule 3.1 at the time of the filing of the N-400, assuming that Atticus inquired of Cal whether he had "ever been arrested, cited, or detained by any law enforcement officer (including any immigration official or any official of the U.S. armed forces) for any reason," and also whether he had "ever been charged with committing, attempting to commit, or assisting in committing a crime or offense." Rule 3.1 imposes a duty to investigate prior to making a factual claim or contention. Here, Atticus obtained the information for the answer to questions 23 and 24 from his client. Although Atticus later learned that the information was false, there was no indication at the time of the filing that further factual inquiry was required. For example, there was no sign that Cal's claims contradicted other credible evidence, nor had Cal shown inconsistency in his answer to these questions, nor was there anything obviously false in Cal's answer. As a practical matter, many practitioners may choose to independently conduct a background check to verify arrest history, though given the record in this case was sealed, even that may not have disclosed the prior arrest.

After their second meeting, however, Atticus knows the information he submitted was incorrect. This knowledge changes things for Atticus in a number of ways. First, Atticus needs to consider his duty of candor under

[72] Rule 1.4(b).

Rule 3.3,[73] his duty of truthfulness in statements to others under Rule 4.1,[74] and his duty not to assist his client in the ongoing commission of a crime or fraud under Rule 1.2.[75] With respect to Rule 3.3, there is no doubt that Atticus now knows that he has submitted material evidence that is false. If USCIS is considered a "tribunal," then he has a duty to take reasonable remedial measures, which might include withdrawing the application or filing an amended application. The question of whether USCIS should be considered a tribunal for purposes of Rule 3.3 has no settled answer; for a discussion of various viewpoints see the Compendium Chapter on Rule 3.3. Regardless of Rule 3.3's applicability to USCIS, though, under Rule 4.1 and 1.2, Atticus will be required to withdraw from representation and "disavow" the N-400 application.[76]

And what if Cal decides that he wants Atticus to submit an amended N-400? The question now becomes whether Cal's claim for citizenship is rendered frivolous by his answering "yes" to questions 23 and 24.[77] The answer: not necessarily. It appears that Cal has been arrested for a crime or offense that may constitute an "aggravated felony"; that, if convicted, this aggravated felony would trigger an automatic bar to citizenship; and that, even if no arrest or conviction results, the fact that Cal has admitted to this criminal act may result in a finding of lack of ' "good moral character" (GMC). Here, Cal was arrested, but never convicted. Therefore, there still may be a number of non-frivolous arguments that he is eligible for naturalization, including that his actions do not or should not constitute an "aggravated felony, or that his statements do not or will not meet the criteria for an "admission" that would trigger an adverse GMC finding. If any such non-frivolous argument exists, then the filing of the corrected N-400 will not violate Rule 3.1. Naturally, Atticus will want to have a long discussion with Cal about the risks of filing the N-400 with the admissions to questions 23 and 24 before deciding whether to move forward with the application.

Hypothetical Three:

Smith regularly provides immigration counsel to Big Data, a large international electronics manufacturer headquartered in California. Smith has prepared and just sent to USCIS by Federal-Express a Form I-140 immigrant petition for alien worker lodged by Big Data on behalf of Jane, an experienced Software Developer who has played a key role in developing Big Data's newest flagship enterprise software system. Jane is an Indian national who is nearing the end of her eligibility for H-1B status. It is Smith's expectation that the Form I-140 petition will be approved in a few weeks, which will permit Big Data to immediately file an H-1B extension petition on Jane's behalf with a request for three additional years of H-1B work authorization.

A few hours before the petition package has left Smith's office, Smith's contact at Big Data notifies Smith that Jane has accepted a position at Little Data, an affiliate of Big Data but a separate company. Smith asks if there is any chance that Jane will ever be hired back by Big Data in the future. The representative says "Probably not, maybe, who knows with this company . . . we change CEOs like people change socks."

What action, if any, must Smith take to avoid violating Rule 3.1?

[73] MR 3.3(a)(3).
[74] MR 4.1(b).
[75] MR 1.2 cmt. 10 ("A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent").
[76] *See* MR 3.3 cmt. 3.
[77] The question of whether Cal should still file the application and Atticus' role in providing thorough informed counseling on that question are governed by MR 1.2(d), 1.4(b), and 2.1.

Variation #1

The Form I-140 petition filed on Jane's behalf is approved 10 days after being submitted. Only after relaying news of the approval to the Big Data representative is Smith advised about the planned Big Data reorganization and that Jane was unexpectedly hired by Little Data "last week."

Variation #2

The Form I-140 petition filed on Jane's behalf draws a Request for Evidence ("RFE"). The RFE is fairly simple, requesting only that Big Data provide evidence of its ability to pay the wage cited in the Form I-140 petition. It is only after advising the Big Data representative of the RFE that Smith is advised about the planned Big Data reorganization and that Jane has already moved on to a position at Little Data.

Analysis

The problem for Smith is that the I-140 asserts that Big Data intends to hire Jane on a permanent basis; if Big Data has no intention of hiring Jane, there is no basis for the I-140. Has the claim that Jane qualifies as an I-140 beneficiary through Big Data been rendered frivolous by the conversation with Big Data's representative? The factual question of Big Data's intent is unclear, and to avoid violating Rule 3.1, Smith must further investigate the potential that Big Data will be re-hiring Jane.

Smith has prepared a petition that contains factual claims (that Jane works at Big Data), and legal claims (that Jane qualifies as an I-140 beneficiary), that at the very least are not as certain as they were before the phone conversation with Big Data. Since Jane no longer works for Big Data, the key factual question for the viability of the I-140 petition is whether Big Data intends to re-hire Jane on a permanent basis. The ambiguity of Big Data's original response to that question requires Smith to do more follow up inquiry to determine the likelihood of re-hire. If Big Data does intend to re-hire Jane, then the petition can be filed without violating Rule 3.1.[78] If it turns out that Big Data does not intend to re-hire Jane, then Smith cannot file the I-140, as doing so would be bringing a proceeding that did not have even a *de minimis* chance of success.[79] In addition, because this fact is especially essential to the viability of the I-140 petition, a failure to investigate it thoroughly would get Smith in trouble, since Rule 3.1 imposes a duty on lawyers to "inform themselves about the facts of their clients' cases."[80]

A more difficult scenario would be if Smith's follow-up questions to Big Data only netted him more vague responses about whether or not they intend to re-hire Jane. The key question again will be whether the nature of Big Data's responses creates at least a *de minimis* chance of succeeding in the application. As always, a smart move on Smith's part would be to consult with other experts in the field to assess those chances.

For Variations 1 and 2, the question becomes what duty Smith has to go back and amend the previously filed I-140. This type of scenario – where an inaccuracy is discovered after a claim is made – is not uncommon, and again implicates ethical duties regarding meritorious claims. If there was no intention to hire Jane at the time of filing, Smith is under the same obligation as in the original scenario to withdraw or amend the petition. If, however, there was an intention to hire Jane at the time of the filing, then there is no obligation under Variation 1 to take any action, because the I-140 was approved based on a truthful and accurate claim at the time it was filed. In Variation

[78] Because the factual claim that Jane is currently working for Big Data is clearly no longer accurate, however, Smith should file an amended Labor Certification to avoid a violation of Rule 4.1, requiring truthfulness in statements to third parties of material fact or law.
[79] If there is a good faith argument to extend, modify, or reverse the rule requiring an employer's intent to hire or re-hire the beneficiary, then the filing would not violate Rule 3.1.This seems unlikely in this scenario.
[80] MR 3.1 cmt. 2.

2, however, because the claim has not been approved and is still being adjudicated pursuant to the RFE, Smith now has no alternative other than withdrawing or amending the petition.

Hypothetical Four:

Smith regularly provides immigration counsel to Zebra Software, an IT consulting firm. Eleven months ago, Smith submitted to the Department of Labor ("DOL") a labor certification application filed by Zebra Software for John, a Chinese national and one of its employees. At the time of filing, Smith, an optimist, had expected the application to be approved in about six or seven months. The timing was important, because John had already spent significant time in the United States.

Now, several months post-filing, having responded to a DOL audit, Smith receives notice that the application has been denied. It turns out that while the application was pending, the Board of Alien Labor Certification Appeals (BALCA) released a decision mandating that certain specific job terms and conditions should "ordinarily" be included in advertisements posted in connection with labor market tests. The DOL, seeing in its review of the audit materials that relevant advertisements did not feature the now-required language, denied Zebra Software's application on that basis alone.

Smith relays news of the denial to John. John has only six months of remaining H-1B time available, and he immediately scours immigration message boards on the internet. He calls Smith with a plan. John tells Smith that Smith should file "some kind of appeal" of the denial, which might then shift the application back into "pending" status long enough for Zebra Software to be in a position to file an H-1B extension petition on John's behalf for one year of additional H-1B time. It does not matter, says John, if the motion is ultimately successful, because they only need the case to remain pending for long enough to secure the new H-1B approval. They could then use that additional year to undertake a new labor market test and file a second application for John.

Can Smith ethically file such an appeal?

Analysis

Yes, because the word "ordinarily" likely provides sufficient leeway to make a non-frivolous claim that the new regulation should not apply to the labor certification application for John. The substantive ethical question for Smith is whether a reasonable lawyer would think that the appeal has at least a *de minimis* chance of success. Answering this question requires a close parsing of the language of BALCA's newly released decision. Under the new mandate, advertisements must include certain specific job terms and conditions that are "ordinarily" included in advertisements posted in connection with labor market tests. The word "ordinarily" provides Smith with a potential legitimate basis for an appeal. Smith could make a claim, for example, that the new mandate should not apply in John's situation since the mandate came down while the certification application was pending, and that is not an "ordinary" situation.

And what if the "pending application" basis for appealing a BALCA denial had previously been denied in other appeals? Even then, there are a number of reasons that the appeal would not be frivolous. First, one could argue that, unless it was an en banc BALCA decision, different BALCA panels can issue decisions with different outcomes. Second, even if there is a decisive BALCA decision against this fact pattern, it would not be frivolous to file an appeal if there is an intention to challenge the BALCA decision in federal court under the Administrative Procedure Act. Finally, if sufficient time had passed since that earlier decision, or if the make-up of BALCA had changed, Smith would not run afoul of Rule 3.1 so long as there is a good faith basis for a reversal or modification of the ruling. In addition, in order to further inoculate the appeal against a 3.1 violation, Smith should ensure that

she explicitly addresses the basis for the denial. Failure to do so can heighten the chances that an appeal will be deemed frivolous.[81]

Finally, although John's stated motivation in this case is merely to delay the denial of the application long enough to file an extension of his H-1B time, that has no effect on whether it is ethically permissible under Rule 3.1 for Smith to file the appeal.[82] Even if Smith were practicing in a state that included an ethical bar on malicious claims, it is extremely unlikely that such a "delay" motivation would constitute malice. Nor would an appeal violate Rule 3.2 (Expediting Litigation), where there is a substantial purpose other than mere delay; here, that would be to overturn the BALCA denial.[83]

D. Summary of State Variations of Model Rule 3.1

Thirty-four states have adopted MR 3.1 either verbatim,[84] or with minor linguistic variations that do not change the meaning of the rule.[85] Variations among the remaining states break down into four categories[86] – (1) the inclusion of "malicious intent" or another "improper purpose" as a ground for determining a claim is unethical; (2) the types of client which merit specific mention as proceedings where a lawyer may "require that every element of the case be established";[87] (3) explicit requirements for investigating or researching claims prior to filing them; and, (4) *mens rea* elements in determining whether a claim is unethical.

States with Malicious Intent or Other Improper Purpose

Nine states explicitly articulate a prohibition on claims brought merely to harass or maliciously injure someone, or other "improper purpose," sometimes in addition to a prohibition on "frivolous" claims, and sometimes instead of it.

Alabama

Alabama prohibits legal actions "when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another," as opposed to frivolous claims generally.[88]

[81] *See, e.g., Clark v. Maurer*, 824 F.2d 565 (7th Cir. 1987) (sanctions imposed for frivolous appeal where appeal did not address underlying basis for lower court decision).
[82] *See supra* notes 71 – 79 and accompanying text.
[83] MR 3.2 cmt. 1 ("The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.").
[84] Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, and West Virginia.
[85] Massachusetts, Michigan, and Ohio.
[86] Note that some states have more than one variation. For a reference chart by state, see the end of this chapter.
[87] *See* MR 3.1 ("A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.").
[88] Rule 3.1 (Alabama)

(a) In his representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the lawyer's client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

California

California prohibits legal actions brought without "probable cause" and "for the purpose of harassing or maliciously injuring any person," in addition to prohibiting claims that have no non-frivolous basis in law and fact.[89]

Georgia

Georgia prohibits legal actions where the lawyer "knows" or "when it is obvious" that the action is brought "merely to harass or maliciously injure another."[90]

Maine

Maine prohibits a lawyer from reporting or threatening to report misconduct for the sole purpose of gaining an advantage in a civil case.[91]

Montana

Montana prohibits a lawyer from asserting a position or claim "for the purpose of harassment, delay, advance of a non-meritorious claim, or solely to gain leverage."[92]

[89] Rule 3.1 (California)

(a) A lawyer shall not: (1) bring or continue an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person; or (2) present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by a good faith argument for an extension, modification, or reversal of the existing law.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, or involuntary commitment or confinement, may nevertheless defend the proceeding by requiring that every element of the case be established.

[90] Rule 3.1 (Georgia)

In the representation of a client, a lawyer shall not:

(a) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

(b) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law…

[91] Rule 3.1 (Maine)

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer shall not report or threaten to report misconduct to a criminal, administrative or disciplinary authority solely to obtain an advantage in a civil matter.

[92] Rule 3.1 (Montana)

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein:
   (1) without having first determined through diligent investigation that there is a bona fide basis in law and fact for the position to be advocated;
   (2) for the purpose of harassment, delay, advancement of a non-meritorious claim or solely to gain leverage; or
   (3) to extend, modify or reverse existing law unless a bona fide basis in law and fact exists for advocating doing so.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

New York

New York prohibits legal actions that would serve only "to harass or maliciously injure another." [93]

Texas

Texas does not specifically permit lawyers to bring good faith arguments for extending, modifying, or reversing existing law.[94]

Wisconsin

Wisconsin prohibits legal actions intended to "merely to harass or maliciously injure another."[95]

Wyoming

Wyoming indicates that a lawyer's signature certifies that the claim is not brought for an improper purpose.[96]

[93] Rule 3.1 (New York)

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) A lawyer's conduct is "frivolous" for purposes of this Rule if:

(1) the lawyer knowingly advances a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation, in violation of Rule 3.2, or serves merely to harass or maliciously injure another; or

(3) the lawyer knowingly asserts material factual statements that are false.

[94] Rule 3.01 (Texas)

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

[95] SCR 20:3-1 (Wisconsin)

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law;

(am) A lawyer providing limited scope representation pursuant to SCR 20:1.2(c) may rely on the otherwise self-represented person's representation of facts, unless the lawyer has reason to believe that such representations are false, or materially insufficient, in which instance the lawyer shall make an independent reasonable inquiry into the facts.

(2) knowingly advance a factual position unless there is a basis for doing so that is not frivolous; or

(3) file a suit, assert a position, conduct a defense, delay a trial or take other action on behalf of the client when the lawyer knows or when it is obvious that such an action would serve merely to harass or maliciously injure another.

(b) A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in deprivation of liberty, may nevertheless so defend the proceeding as to require that every element of the case be established.

[96] Rule 3.1 (Wyoming)

(a) A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that

Types of Representation Where Lawyers May Defend a Proceeding to "Require Every Element of a Case Be Established"

MR 3.1 makes special mention of cases where a lawyer is representing a client in a criminal proceeding or other matter where the client could be incarcerated.[97] This provision of the Rule expressly permits lawyers defending such clients to put the opposing side to the test to meet their burden of establishing each and every required element.[98] The Rule's commentary also recognizes that the obligations of lawyers in criminal matters may require them to bring claims that might otherwise by prohibited.[99] Seven states either expand or eliminate this "incarceration exception" to the Rule.

Alaska

Alaska expands the type of case meriting special mention to include where a potential consequence is "involuntary institutionalization," in addition to incarceration.[100]

California

California expands the type of case meriting special mention to include where a potential consequence is "involuntary commitment or confinement," in addition to incarceration.[101]

Washington D.C.

D.C. replaces "incarceration" with "involuntary institutionalization."[102]

could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

(b) The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

[97] *See supra* nn. 48 – 53 and accompanying text.

[98] MR 3.1.

[99] MR 3.1 Comment 3.

[100] Rule 3.1 (Alaska)

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a non-frivolous basis in law and fact for doing so, including a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding or for the respondent in a proceeding that could result in incarceration or involuntary institutionalization may nevertheless so defend the proceeding as to require that every element of the case be established.

[101] *See supra* n. 88.

[102] Rule 3.1 (District of Columbia)

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or for the respondent in a proceeding that could result in involuntary institutionalization, shall, if the client elects to go to trial or to a contested fact-finding hearing, nevertheless so defend the proceeding as to require that the government carry its burden of proof.

Maryland

Maryland expands the type of case meriting special mention to any time a lawyer is "defending" a proceeding, instead of limiting it to criminal cases or other cases where the defendant or respondent could face incarceration.[103]

North Dakota

North Dakota expands the type of case meriting special mention to include cases where a potential consequence is "commitment," in addition to incarceration.[104]

Texas

Texas does not include any special mention of cases where incarceration might result.[105]

Wisconsin

Wisconsin specifies that the type of cases meriting special mention are criminal cases, and those where a client faces a "deprivation of liberty."[106]

Inquiry into Legal and Factual Bases for Claims

Three states provide an explicit standard for the level of inquiry into the legal and factual claims that is required of lawyers.

Montana

Montana prohibits a lawyer from taking any legal actions without first making a "diligent investigation" that a "bona fide basis in law and fact" exists for the action.[107]

Tennessee

Tennessee prohibits a lawyer from bringing a claim unless the lawyer has first conducted a "reasonable inquiry" to ensure that the claim has a non-frivolous basis in law and fact.[108]

[103] Rule 19-303.1 (Maryland)
An attorney shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes, for example, a good faith argument for an extension, modification or reversal of existing law. An attorney may nevertheless so defend the proceeding as to require that every element of the moving party's case be established.
[104] Rule 3.1 (North Dakota)
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration or commitment, may nevertheless so defend the proceeding as to require that every element of the case be established.
[105] *See supra* n. 93.
[106] *See supra* n. 94.
[107] *See supra* n. 91.
[108] Rule 3.1 (Tennessee)
A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless after reasonable inquiry the lawyer has a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a

Wyoming

Wyoming indicates that a lawyer's signature is a certification that she or he has read the claim, and that to the best of his or her knowledge, information, and belief "after reasonable inquiry," the claim is "well grounded" in fact and "warranted by existing law" or otherwise included under the exception for good faith extension, modification, or reversal of existing law.[109]

Mens Rea Elements

Five states add an explicit element that relates to a lawyer having a "reasonable belief" or "knowledge" that there is a non-frivolous basis for a claim. Two states (New Jersey, Texas) frame this element as a requirement to make a claim permissible; in other words, the lawyer must have a reasonable belief, or know, that a claim is *non-frivolous* in order to make a claim *ethical*. Other states (New York, Oregon, Wisconsin) frame this element as a requirement that the lawyer must "know" a claim is *frivolous* in order for the claim to be *unethical*.

New Jersey

New Jersey prohibits a lawyer from making a claim unless the lawyer knows or "reasonably believes" that there is a non-frivolous basis in law and fact for the claim.[110]

New York

New York prohibits lawyers from asserting material factual statements in claims only where the lawyer "knows" the statements are false.[111]

Oregon

Oregon prohibits lawyers from "knowingly" advancing frivolous claims.[112]

Texas

Texas requires lawyers to "reasonably believe" that there is a non-frivolous basis for claims.[113]

proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[109] *See supra* n. 95.

[110] RPC 3.1 (New Jersey)
A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

[111] *See supra* n. 92.

[112] Rule 3.1 (Oregon)
In representing a client or the lawyer's own interests, a lawyer shall not knowingly bring or defend a proceeding, assert a position therein, delay a trial or take other action on behalf of a client, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law, except that a lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration may, nevertheless, so defend the proceeding as to require that every element of the case be established.

[113] *See supra* n. 93.

Wisconsin

Wisconsin prohibits lawyers from "knowingly" advancing frivolous claims.[114]

Chart of Variations by State

State Name	Variation(s)
Alabama	Alabama prohibits legal actions "when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another" (as opposed to frivolous claims, generally).
Alaska	Alaska allows lawyers to require all elements of a case to be established where one of the potential consequences to such is "involuntary institutionalization" (as opposed to incarceration, generally).
California	California prohibits legal actions brought without "probable cause" and "for the purpose of harassing or maliciously injuring any person," in addition to prohibiting claims that have no non-frivolous basis in law and fact. California expands the type of case meriting special mention to include where a potential consequence is "involuntary commitment or confinement," in addition to incarceration.
District of Columbia	D.C. makes several changes to the part of the rule permitting lawyers to require all elements of the case to be established where such case could result in incarceration. First, D.C. replaces "incarceration" with "involuntary institutionalization." Second, D.C. requires lawyers to call for the government to "carry its burden of proof" (as opposed to proving every element of the offense) in such cases if the client chooses to go to trial or a contested fact-finding hearing.
Georgia	Georgia forbids a lawyer from taking an action if the lawyer knows or it is "obvious" that the action would serve "merely to harass or maliciously injure another" (as opposed to forbidding frivolous claims).
Maine	Maine adds an additional provision that forbids lawyers from reporting or threatening to report misconduct to an authority for the sole purpose of obtaining an advantage in a civil matter.
Maryland	Maryland allows lawyers to require the moving party establish every element of its case in *all* cases (as opposed to only in cases in which the defendant faces incarceration).

[114] *See supra* n. 94.

State Name	Variation(s)
Montana	Montana requires lawyers to undergo a "diligent investigation" to ensure that a "bona fide basis in law and fact" exists before bringing or defending an action. Montana forbids lawyers from bringing an action or asserting a position for the purpose of "harassment, delay, advancement of a non-meritorious claim, or solely to gain leverage."
New Jersey	New Jersey permits lawyers to bring proceedings where they "reasonably believe" that there is a non-frivolous basis in law and fact for doing so.
New York	New York prohibits lawyers from engaging in conduct that "serves merely to harass or maliciously injure another." New York prohibits lawyers from knowingly asserting material factual statements that are false.
North Dakota	North Dakota allows lawyers to require that all elements of a case be established where the consequence is "commitment" (as opposed to mere incarceration).
Oregon	Oregon only forbids lawyers from advancing claims that they know are frivolous.
Tennessee	Tennessee requires lawyers to make a "reasonable inquiry" to ensure that arguments have a non-frivolous basis in law and fact.
Texas	Texas requires lawyers to "reasonably believe" that there is a non-frivolous basis for claims. Texas does not specifically permit lawyers to bring good faith arguments for extending, modifying, or reversing existing law (which is specifically permitted in the Model Rule). Texas does not specifically permit lawyers to require all elements of a case be established where the consequences include incarceration (which is specifically permitted in the Model Rule).
Wisconsin	Wisconsin only forbids lawyers from advancing claims or defenses that they know are unwarranted under existing case law (as opposed to those that are "not frivolous"). Wisconsin prohibits actions intended to "merely harass" or "maliciously injure." Wisconsin's law allows a lawyer to require every element of a case be established in cases where the defendant faces a "deprivation of liberty" (as opposed to "incarceration").

State Name	Variation(s)
Wyoming	A lawyer's signature certifies that the action, to the best of his/her knowledge after reasonable inquiry, meets the requirements of Rule 3.1. A lawyer's signature certifies that the action does not have an improper purpose.

American Immigration Lawyers Association

AILA ETHICS COMPENDIUM

ABA MODEL RULE 3.3
CANDOR TOWARD THE TRIBUNAL

Sherry K. Cohen, Reporter
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INTRODUCTION TO THE ETHICS COMPENDIUM REPORT

The purpose of this resource is to provide guidance to immigration lawyers to understand and navigate the myriad ethical issues and dilemmas that arise in immigration practice. There is often a complex interaction of state and federal rules, regulations, and laws that are meant to shape the professional behavior of lawyers practicing before federal courts, administrative tribunals, and various federal agencies.

In order to make this subject understandable and readable, we have chosen to use the same topics and numbering system of the ABA Rules of Professional Conduct. All state bars use the Model Rules as a starting point for their state's Rules of Professional Conduct, but rules can differ substantially in each state.[1]

The format for each Report will be as follows:

A. Text of Rule

We will begin with the text of the ABA Model Rule that is the subject of the Ethics Compendium Report. Black letter rules are rules for breach of which discipline may be imposed, directly or by reciprocity. In addition, we will provide the text of the ABA Comments to the rule. The Comments, which are not incorporated in the rules, are only persuasive authority and provide clarification of terms and guidance for practicing in compliance with the Rules. We will also provide, if applicable, the text of any related ethical rule promulgated by the Executive Office for Immigration Review (the "EOIR"), which governs the ethical conduct of immigration practitioners in particular. Immigration practitioners should be aware that they are subject, generally in the first instance, to the applicable Rules of Professional Conduct.[2] Because the substance of the ABA Model Rules are very similar to most state rules, it is very helpful to be familiar with the requirements of the Model Rules and their commentary.

B. Key Terms

We will discuss in detail the key terms used in the Rule, whether formally defined or not.

C. Annotations and Commentary

We will provide our own annotations and commentary for each sub-section of the Rule, including discussion of the parallel EOIR rule ethics opinions and case law, where applicable.

D. State Rule Variations

Because some states' Rules of Professional Conduct may vary substantially from the ABA Rule, we will summarize state variations from the ABA rule, with a more detailed discussion of the variations in Appendix A.

E. Hypotheticals

We conclude with immigration law hypotheticals involving the application of the Rule and our recommendations as to the appropriate way to handle the issues presented.

Sherry K. Cohen, Reporter

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Caveat: The information in this Report reflects the Ethics Committee's information and views. It is not intended to constitute legal advice.

[1] As we will discuss below, because state rules can differ from the ABA Model Rules, immigration practitioners should be mindful of the differences in the rules or any ambiguity as to how a state rule of professional conduct is applied. If immigration practitioners are in doubt, we recommend that they seek guidance from local bar associations or obtain an ethics opinion from a professional responsibility lawyer.

[2] The question of which rules apply is often quite complex. See Rule 8.5 for additional guidance.

ABOUT THE REPORTERS

Sherry K. Cohen is counsel to the Law Firm of Richard M. Maltz, PLLC, in the area of Professional Responsibility Law. She served as first deputy chief counsel to New York's Departmental Disciplinary Committee (DDC), First Department, Appellate Division (2003–10) and as staff attorney (1993–2003). Prior to joining the DDC, she was a litigation associate at Schulte Roth & Zabel. She graduated from Hofstra University School of Law with honors, including membership in the Hofstra Law Review. In her tenure at the DDC, Ms. Cohen concentrated on matters involving substandard representation and unauthorized practice in the immigration area. Her notable immigration discipline cases include *Matter of Wilens and Baker*, *Matter of Muto*, *and Matter of Rodkin.* Ms. Cohen is a member of the New York City Bar Association, Professional Responsibility Committee; the American Immigration Lawyers Association (AILA); and a former member of the Honorable Robert Katzman (U.S. Court of Appeals for the Second Circuit) Immigration Study Group. She has participated in numerous CLE programs on attorney ethics and published an article in the *New York Law Journal* entitled "Professional Discipline: The Immigration Lawyer's Nightmare" (Jan. 31, 2013).

Theo Liebmann is a Clinical Professor of Law at Hofstra Law School. He has taught at Hofstra and directed Hofstra's Youth Advocacy Clinic since 1999. Professor Liebmann regularly conducts trainings on ethical issues and on the overlap of immigration matters and family court proceedings. He has written law review articles and legal journal columns on ethical challenges in the representation of children, and how ethical mandates affect the representation of immigrant children and families in state courts. Professor Liebmann and his students have advocated on behalf of hundreds of youth involved in immigration, family, and appellate courts. Professor Liebmann co-chairs a New York State Council that has issued statewide guidance to lawyers and jurists on Special Immigrant Juvenile Status; U-Visas; and Adverse Immigration Consequences to Family Court Adjudications. He is on the editorial board of the Family Court Review and serves as a Special Advisor to the American Bar Association Commission on Youth at Risk. Professor Liebmann received his B.A. from Yale University and his J.D. from the Georgetown University Law Center.

CONTRIBUTORS

AILA Ethics Compendium Subcommittee
Alan Goldfarb, Chair
Cyrus Mehta
Robert Juceam
Meghan Moore
Michelle Valerio

AILA Ethics Committee
Cyrus Mehta, Chair
Alan Goldfarb
Alejandro Solorio
David Bloomfield
Maria Celebi
Meghan Moore
Melissa Chavin
Michelle Valerio

Board of Advisors
Michael Patrick
Helena Younossi
Eric Cooperstein
Dan Kowalski

AILA Staff
Reid Trautz
Maheen Taqui
Mary Johnson
Robert Bequeaith
Kathy Frazier

MODEL RULE 3.3 CANDOR TOWARD THE TRIBUNAL

Of all the attributes we most come to expect of a lawyer, honesty is among the foremost. For that reason, it is not surprising that the ABA Model Rules (MR) contain a number of rules concerning a lawyer's obligation to act honestly.[3] The American public counts on a lawyer to be honest and forthcoming in his dealings with clients or others. Certainly, when we need to engage a lawyer to obtain relief or defend against another's claim for relief, we expect that our lawyer and all other lawyers involved in the matter will behave in an honest manner before the court. We don't expect a lawyer to knowingly offer false evidence in a court proceeding no matter how zealously he represents a client. We don't expect a lawyer to assist her client or anyone in perpetrating a fraud on a tribunal or committing a criminal act. On one hand, we rely on lawyers as officers of the court to preserve the integrity of the legal system so that it can fairly resolve disputes or otherwise grant relief. On the other hand, a client needs to trust in her lawyer so that she can be comfortable telling the lawyer the truth, even if it is harmful to her as the client. The client has an expectation that whatever she tells the lawyer will be held in the strictest confidence. But these expectations—that a lawyer will be honest in his dealings with a court while at the same time maintaining client confidences—can create both a practical and an ethical dilemma for the honest and conscientious lawyer.

For an immigration practitioner, in particular, the line between the obligation to preserve client confidences (which may not only be adverse, but may establish a complete bar to achieving legal status) and the obligation of candor to the appropriate immigration agency or court can be a difficult line to walk. The honest and conscientious immigration lawyer may come across a client who—because of corruption in his country of origin, advice from dishonest or incompetent non-lawyers or simply desperation—may seek the assistance of a lawyer in perpetrating a fraud on immigration authorities in order to obtain legal status. There may be others who have been advised to lie to their lawyer or conceal damaging information in hopes of duping their lawyer. A conscientious and honest lawyer may be tempted to look away or even knowingly cross the line out of a misplaced sense of loyalty to or sympathy for the client. MR 3.3 serves as a stark reminder of the lawyer's obligation not to fall into that trap. Comment 2 to MR 3.3 expresses the overriding purpose of the rule, stating in part:

> A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, *the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.* [Emphasis added].

MR 3.3 is explicit in stating the lawyer's obligation of candor when appearing before a tribunal. It plainly prohibits a lawyer from knowingly offering false evidence in a variety of circumstances. The rule also goes a step further. The lawyer must take steps—denominated as "reasonable remedial measures"—to prevent or expose the false evidence or fraud on the tribunal once he comes to learn of it. The remedial measures include, when necessary, the disclosure of information otherwise deemed confidential.[4]

[3] *See e.g.*, Model Rules (MR) 8.4 (prohibiting dishonest or deceitful conduct in all dealings); MR 4.1 (prohibiting misrepresentation to third parties in representation of client); MR 4.3 (imposing duties of candor in dealing with an unrepresented person); MR 1.2(d) (prohibiting knowingly counseling or assisting client in criminal or fraudulent conduct); MR 3.4 (prohibiting dishonest conduct in the course of representing a client, including illegal suppression of evidence, advising client to leave jurisdiction and improper payment to witnesses); MR 3.5 (prohibiting attempt to improperly influence tribunal); MR 4.4 (prohibiting improper methods of obtaining evidence and failure to properly handle documents inadvertently produced).

[4] Although not the subject of this report, MR 4.1 also imposes a duty upon a lawyer, in the course of representing a client, to refrain from making false statements to third parties and imposes a duty of disclosure of a material fact to avoid assisting a client in committing a fraud. Specifically, MR 4.1 provides that in "the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law to a third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6." Under MR 1.2(d), a lawyer is prohibited from

MR 3.3 is applicable to lawyers practicing in all areas of law. In addition, the EOIR has promulgated rules that provide grounds for discipline of immigration practitioners only. See 8 CFR §1003.102. These rules apply to lawyers who practice before the EOIR as well as the various components of the Department of Homeland Security (DHS).[5] One subsection of the EOIR rule (8 CFR §1003.102(c)) parallels the requirements of MR 3.3 in that it prohibits a lawyer from engaging in deceptive or misleading conduct in matters pertaining to legal status and requires the lawyer to take remedial measures to prevent deception or fraud.[6] The EOIR professional conduct rules overall are narrower in scope than the Model Rules, but in many cases, the EOIR grounds for discipline include language similar to the Model Rules, in part, because the legal profession has already accepted them.[7]

In the EOIR rules referred to above, as in the case of MR 3.3, a special obligation of candor toward the tribunal is imposed. We discuss the lawyer's duty of candor below.

A. Text of Rule 3.3 and Other Related Rules

Model Rule 3.3—Candor toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

counseling or assisting a client in conduct the lawyer knows is criminal or fraudulent. If the client's crime or fraud is perpetrated in the form of a lie or misrepresentation of a fact, under MR 4.1(b), the lawyer may be required to disclose the lie or false statement subject to the prohibitions in MR 1.6, if that is the only way the lawyer can avoid a finding that he assisted a client's fraud. While MR 4.1(b) does not favor candor over confidentiality, as does MR 3.3, it does impose some affirmative duties on lawyers to prevent a client from using the lawyer's services to commit a fraud. When considering her duty of candor under MR 3.3, the lawyer should be mindful of MR 4.1 and MR 1.2(d), as well.

[5] 8 CFR §292.3(a)(1).

[6] There are other grounds for discipline under the EOIR rule that concern lawyer honesty: 8 CFR §1003.102(i) prohibits an immigration practitioner from knowingly or with reckless disregard falsely certifying a copy of a document as being a true and correct copy of the original; 8 CFR §1003.102(s) prohibits an immigration practitioner from failing to disclose to an adjudicator legal authority in the controlling jurisdiction known, but not disclosed by opposing counsel. Other sub-sections prohibit an immigration practitioner from engaging in bribery or coercion of any person in connection with a case (8 CFR §1003.102(b)); knowingly or with reckless disregard making a false communication about the lawyer's qualifications (see 8 CFR §1003.102(f)); and, engaging in a pattern of failing to file Notices of Appearance in cases in which the lawyer has essentially represented the client in her application for relief (8 CFR §1003.102).

[7] *See* Final Rule, EOIR Professional Conduct for Practitioners, Response to General Comments, §3.102 and Comments to §3.102(c) 65 Fed. Reg. 39513 (June 27, 2000); Final Rule, EOIR Professional Conduct for Practitioners, Regulatory Background, 73 Fed. Reg. 76914 (Dec. 18, 2008); Department of Homeland Security (DHS) interim rule "Professional Conduct for Practitioners: Rules, Procedures, Representation, and Appearances," 75 Fed. Reg. 5225 (Feb. 2, 2010).

Comment—Rule 3.3

[1] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes. This duty is premised on the lawyer's obligation as an officer of the court to prevent the trier of fact from being misled by false evidence. A lawyer does not violate this Rule if the lawyer offers the evidence for the purpose of establishing its falsity.

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify, but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] The duties stated in paragraphs (a) and (b) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See also Comment [9].

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although

a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[9] Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

Remedial Measures

[10] Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal, but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating, or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence, or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for

the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also, see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

Model Rule 4.1—Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

EOIR Rule—8 CFR §1003.102(c)

An immigration practitioner is subject to discipline if he:

> [k]nowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.

B. Key Terms[8]

1. Tribunal

Under MR 1.0(m), the term tribunal is broadly defined and covers many proceedings other than trials. It may be a court, an arbitrator in arbitration, and a legislative body or administrative agency acting in an adjudicative capacity.[9] The term tribunal also encompasses "an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority" such as a deposition.[10]

[8] ABA Model Rule 1.0 defines only certain terms used in the Model Rules.

[9] *See* MR 1.0(m): "'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter."

[10] *See* Comment 1 to MR 3.3 states:

> This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. *See* Rule 1.0(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false. *See also N.Y. County Ethics Op.* 741 (2010) (duty of candor under Rule 3.3 applies to client's testimony at deposition); *Fla. Bar Ethics No.* 75-19 (1977, affirmed 1998 after rule amended) (Rule 4-3.3 applicable to perjury committed in deposition, which is a fraud on the tribunal, regardless of whether the deposition has been filed with the court).

Under this definition, there is no doubt that the Immigration Court constitutes a tribunal. Whether or not USCIS constitutes a tribunal is far less settled. Some courts have found that applications before USCIS fall under Rule 3.3's purview, but at least one ethical opinion has explicitly disagreed.[11] But while there may be ambiguity created by the absence of a controlling or authoritative ruling regarding the application of Rule 3.3 to USCIS proceedings, there are important reasons why a lack of candor before USCIS is problematic even outside of Rule 3.3. First, other ethical rules require truthfulness: Rule 4.1 requires both that a lawyer refrain from knowingly making a false statement and that a lawyer disclose a material fact when necessary to avoid assisting a criminal or fraudulent act by a client; and Rule 1.2 prohibits a lawyer from assisting a client with conduct the lawyer knows is fraudulent or criminal.[12] Second, the knowing presentation of false evidence to any government entity exposes the perpetrator to criminal liability.[13] Any immigration lawyer found to have participated in such fraudulent conduct is subject to criminal sanctions irrespective of whether or not the government entity involved was deemed a tribunal under MR 3.3. And finally, 8 CFR §1003.102(c) prohibits the making of false statements or the offering of false evidence to "*any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material or relevant matter relating to a case."* [emphasis added]. The EOIR Rules setting forth the grounds for discipline for immigration practitioners are not limited by the term "tribunal"; indeed, the term is neither used nor defined. In addition, the reach of the rule is broader than MR 3.3 in that it applies to a party or "any person" associated with the resolution of a particular immigration case and to matters "relevant," not just "material." Therefore, even in the absence of a definitive ruling on whether USCIS constitutes a "tribunal," there are numerous reasons to avoid knowing misrepresentations to USCIS, as well as to an Immigration Court.[14]

2. Knowledge

Under MR 3.3, the lawyer's knowledge of false evidence or fraud triggers the duty of candor. MR 1.0(f) defines the terms "knowingly," "known," or "knows" as "actual knowledge of the fact in question [which] may be inferred."[15] Since knowledge may be inferred, a lawyer cannot ignore red flags or otherwise consciously avoid information that negates the truth of the evidence.[16]

With respect to statements offered by the lawyer based on her personal knowledge, the lawyer would be expected to make a "reasonably diligent inquiry" as to the truth of the statements.[17] If the client or witness admits the falsehood, that will typically constitute knowledge. Nevertheless, a lawyer should always first clarify that the "falsehood" the client or witness is admitting to does in fact constitute a falsehood, and that the new statement is in fact "the truth," rather than the earlier statement. The lawyer may also come to know of the falsehood on her own

[11] *Compare In re Vohra*, 68 A.3d 766 (D.C. 2012) (affirming violation of Rule 3.3 where lawyer forged clients' signatures on application to USCIS), *In re Disciplinary Proceeding Against Conteh*, 284 P.3d 724 (Wash. 2012) (misrepresentation by lawyer on asylum application to USCIS deemed a violation of Rule 3.3); *with* N.Y. STATE BAR OP. 1011 (2014) (finding USCIS does not constitute a "tribunal" for purposes of Rule 3.3 because, *inter alia*, there is no adverse party, no legal argument, and no cross-examination involved in applications to USCIS).

[12] MR 4.1; MR 1.2(d).

[13] *See e.g.*, 18 USC §1001 (criminal penalties and imprisonment for knowing false statements) and 18 USC §1546 (criminal penalties and imprisonment for fraud and misuse of visas and other immigration documents).

[14] Any immigration lawyer encountering this issue should check the applicable state's analogous rule of professional conduct and consider seeking guidance from the appropriate state bar association or an ethics professional.

[15] *See* MR 1.0(f).

[16] *See U.S. v. Sheldon Walker*, 191 F.3d 326, 338 (2d Cir. 1999) (where immigration lawyer attributed criminal responsibility for false asylum applications to his employees, court rejected claim based on facts showing that he "deliberately remained ignorant" of employee's preparation of false statements in applications; under circumstances, court found "conscious avoidance" jury charge proper).

[17] Comment 3 states in pertinent part that "an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of *a reasonably diligent inquiry*." [Emphasis added].

based on documents or other conclusive evidence. If the other evidence is not conclusive and there is no admission by the client or witness, the lawyer may not "know" within the meaning of MR 3.3.[18]

Example: Lawyer meets with Client she is representing in asylum application based on religious persecution. Client has said he was devout member of the persecuted religious group, and that government actors knew of his affiliation and persecuted him directly because of it. At this meeting, Client states that he was really only an occasionally observant member of the religious group and he is not sure that was the grounds for his arrests and mistreatment by the government. When Lawyer presses Client, he again claims he was devout and that he is convinced that was the basis for the persecution.

In this example, Lawyer very likely has well-founded suspicions about the veracity of her client's statements, but absent additional information, this will not constitute "knowledge" of falsity. Of course, there may be obligations to investigate further both to ensure diligent fact-finding, as well as avoid a claim of "reckless disregard" for the truth under the EOIR rule (see below).

In the immigration context in general, information deemed sufficient to establish knowledge is not always clear. For example, a client's statement that "she would do anything to avoid deportation, even lying in court," (without more) was deemed insufficient to even establish the lawyer's claimed "reasonable belief" that her client intended to commit perjury. Purportedly on the basis of that reasonable belief the lawyer had notified law enforcement authorities. The court found that the lawyer had violated Florida's confidentiality rule, Rules Regulating the Florida Bar 4-1.6.[19]

Knowledge under EOIR rule

Three comparable EOIR rules relating to the obligation of candor impose liability for conduct that is not only engaged in "knowingly" but also with "reckless disregard for the truth." See 8 CFR §§1003.102(c) (deception and false evidence), §1003.102(i) (false certification), and §1003.102(f) (false communication about qualifications). "Knowledge" and "reckless disregard" are not defined under the EOIR rules, but a prudent and conscientious immigration lawyer should consider that the EOIR disciplinary authority, like state disciplinary authorities, can infer the degree of the lawyer's knowledge from the circumstances. For example, many immigration lawyers rely initially on the information provided by their foreign national clients as to any procedural history before immigration authorities or other relevant facts. For that reason, the prudent and conscientious immigration lawyer should have a comprehensive informational protocol for gathering relevant facts, which also includes advising the client about the importance of telling the truth and otherwise taking steps to provide the lawyer with the most accurate information available. As a practical matter, this should include asking the client to advise the lawyer if he does not have or is unsure about the accuracy of the information.

Given that an immigration lawyer may be disciplined by the EOIR for the submission of false evidence with "reckless disregard for the truth," he should engage in a level of inquiry (beyond information provided by the client) that would enable a reasonable lawyer to discover the truth. In the immigration context, that inquiry may include a review of the client's previous record before the USCIS, DOL or other agency to the degree it is timely available. An immigration attorney who either (1) fails to make a FOIA request that is possible under the circumstances; or (2) fails to review the record when it is ultimately provided, risks being deemed to have acted with reckless disregard for the truth if it turns out his client lied about a prior proceeding or submitted false evidence in that proceeding. Similarly, the EOIR might conclude that an immigration lawyer had "constructive knowledge" of information contained in his client's previous administrative or EOIR record, even if he unknowingly overlooked certain

[18] *See NY County Lawyers Association Ethics Opinion* 741 citation to *In re Grievance Committee*, 847 F.2d 51, 63 (2d. Cir 1988) (interpreting former NY DR 7-102, stated that required level of knowledge does not have to be "proof beyond a moral certainty" but the lawyer must "clearly know rather than suspect" the falsity of evidence before disclosure."), *Philadelphia Bar Ethics Opinion*, 2005–7 (Mar. 2005) (opinion from expert that party may have committed fraud without more does not constitute "knowledge" within meaning of Rule 3.3).

[19] *See Fla. Bar v. Knowles,* 99 So.3d 918 (Fla. 2012).

information in the record. As stated in Comment 8 to MR 3.3, a lawyer cannot "ignore an obvious falsehood."[20] Because immigration lawyers sometimes need to take action on short notice—before they obtain their client's record—a prudent and conscientious immigration lawyer should document all communications with the appropriate immigration authority regarding efforts to obtain records. Lawyers must of course also exercise professional judgment when determining whether to file FOIA requests; the ensuing delay may well create more risk than the risk that an undiscovered problem might be lurking in the client's file. A FOIA request with USCIS, for example, can take several months and often the response is heavily redacted. Therefore, when time is of the essence, foregoing the FOIA request may be justifiable if the attorney is able to obtain the necessary information from the client in other ways.

3. Reasonable Belief

Under MR 3.3, a reasonable belief of false evidence or fraud does not trigger the duty of candor. MR 1.0(h) defines the term "reasonable" or "reasonably" as applying to "the conduct of a reasonably prudent and competent lawyer." Under MR 1.0(i) "reasonable belief" denotes that the lawyer "believes the matter in question and that the circumstances are such that the belief is reasonable." While those definitions may be circuitous, they still provide guidance. Whether a lawyer has a "reasonable belief," rather than "knowledge" of false information, will depend on the circumstances, including the presence of "red flags" and the level of inquiry, if any, taken by the lawyer.[21]

In the immigration context, some examples of evidence that may lead to a reasonable belief—but not knowledge—of fraud are described below:

- Your client has taken some time producing his original birth certificate and appeared to be nervous when he gave it to you. The purported original birth certificate is old and tattered. The client's name is illegible and incomplete on the certificate, but it otherwise complies with the Department of State guidelines on the issuing country's birth certificates. You call attention to the suspicious condition of the birth certificate and remind your client of the consequences of submitting a fraudulent document and your ethical obligation against your knowingly submitting a false document. Your client aggressively denies that the certificate is false, but his explanation sounds rehearsed and you are not persuaded. You show the document to a document expert, but he cannot say with any certainty that the document is not what your client says it is. Under the circumstances, you do not have knowledge of any falsity. But for the reasons discussed above, you have a reasonable belief that your client may be submitting a fraudulent document. And, you have surely fulfilled your obligations to conduct a "reasonably diligent inquiry." Given the suspicious circumstances, it would be prudent to make sure your file has documentation of your effort.
- In an asylum case, your client's original statement given to the asylum officer during the credible fear interview at the border differs from what he tells you now as he is preparing his case. Over the course of time, since he retained you, he has become familiar with the law as to the kinds of facts needed to qualify for the type of asylum he is now seeking. The facts as told to you now present a better case for asylum. Because of the discrepancy, you challenge your client in a mock cross-examination. You warn him about the consequences of lying under oath and your own ethical obligations not to knowingly present false testimony. He is very nervous under cross-examination and, in a few key instances, he corrects himself in a helpful way, claiming that he was just confused by your question. Because of his demeanor, you may have a reasonable belief your client may be lying, but you have no conclusive proof and thus no "knowledge". Discrepancies in or additions to the client story between the credible fear interview and later may, of course, merely be attributable to the client's being better informed about the asylum process and understanding what kind of details are relevant to an asylum claim rather than an indication of fraud.

[20] *See Matter of Sheldon Walker, supra*. *See U.S. v Abrams*, 427 F.2d 86 (2d Cir. 1970) (knowledge could be inferred from conscious purpose to avoid learning the truth and reckless disregard of whether statements made in affidavit were true).

[21] *See Maryland State Bar Ethics Opinion*, 05-15 (where witness who testified in favor of client tells client he is entitled to financial help because he lied, but then claims he did not, lawyer does not have "knowledge", but cannot ignore and must investigate further to rule out conclusive proof of perjury); *Fla. Bar v. Knowles, supra*.

- Your client gives you information about his residence history for purposes of completing Form I-485, Application for Adjustment of Status, that differs significantly from the residence history listed on his separately-filed Form I-130, which he filed a few months earlier, and which he completed himself. You point out the discrepancy, warn him of the consequences of fraud, and advise him of your own ethical obligations. Your client claims that when he filled out the forms by himself, he forgot some of the information. When you express your doubts, your client tells you he had found the form confusing and asked a friend to help him. Your client never mentioned this friend before. He introduces you to the purported friend who comes across to you as very untrustworthy. On this basis, you may have a reasonable belief that your client may be lying now, but you have no conclusive proof. You may, however, need to conduct additional "reasonably diligent inquiry." Again, given the suspicious circumstances, you should make sure your file has documentation of your effort.
- Your client claims experience at a previous employer that has gone out of business. Your client gets an experience confirmation letter from his old manager, with whom he is still in contact. Your internet search for the company provides no evidence that any such business existed. When you ask your client to arrange a meeting with the old manager, the client tells you that the old manager has become very ill and refuses to be further involved. You express your concerns about the validity of the letter based on the fact that you cannot locate information about the company on the internet and cannot personally verify the statements made in the experience confirmation letter from the old manager. Your client tells you he thinks the owner of the company operated under different names for tax purposes, but he doesn't know the names. Based on the absence of internet information and the unavailability of the old manager, you may have a reasonable belief that the work experience information is false, but you have no conclusive proof. Although you do not have sufficient evidence to support actual knowledge of false evidence, under these circumstances, best practice suggests that a prudent and conscientious lawyer retain a heightened sensitivity to the veracity of other assertions by this client. In addition, competent representation will require clearly and unambiguously informing the client of the possibility that the USCIS officer may be suspicious about the letter and request additional information.

4. Fraud

Under MR 3.3, a lawyer's duty of candor is triggered by knowledge that a fraud will be or has been perpetrated on the tribunal. MR 1.0(d) defines the terms "fraud" or "fraudulent" as applying to conduct that is "fraudulent by substantive and procedural law … and has a purpose to deceive." Comment 12 sets forth in detail criminal conduct that "undermines the integrity of the adjudicative process." It includes "bribing, intimidating or otherwise unlawfully communicating with a witness, juror, or court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so".[22] Obviously perjury is fraud. Since the definition of fraud encompasses intent to deceive, fraud would not include the introduction of false evidence through negligence or innocent mistake.[23] What constitutes negligence or an innocent mistake may be subject to interpretation. Accordingly, even though a lawyer is not required to vouch for evidence submitted in each case, the prudent and conscientious immigration lawyer should make reasonable efforts to ascertain the truthfulness of evidence he submits on his client's behalf. Failure to take appropriate measures can result in allegations or findings that the lawyer deliberately remained ignorant.[24]

In the immigration context, some examples of immigration fraud are described below:

- A client may make a false claim to a bona fide marriage to gain adjustment of status, employment authorization, and parole even though the parties do not intend to live together as husband and wife. The

[22] *See* Comment 12 to MR 3.3.

[23] *See* Comment 5 to MR 1.0. Fraud does not include "merely negligent misrepresentation or negligent failure to apprise another of relevant information." Nor is actual reliance or injury an element for purposes of the rules. However, if you come to know that you have introduced false evidence, you have a duty to correct even if the original introduction was negligent or even innocent. *See* MR 3.3(a)(3)

[24] *See U.S. v. Abrams*, 427 F.2d 86 (2d Cir 1970); *U.S. v. Sarantos*, 455 F.2d 877 (2d Cir. 1972).

parties may present bank records, bills, lease agreements, insurance benefits, photographs, affidavits from so-called friends and relatives and similar documents created solely for the purposes of supporting the conclusion that there is a bona fide marital relationship, when none in fact has ever existed.

- In a nonimmigrant visitor application, a client may falsely claim an intent to remain in the United States only temporarily that is supported by false documents related to work or property in a different country.
- A client may submit an employment-based visa petition that is supported by false transcripts or degrees, certificates, or experience letters pertaining to the beneficiary.
- A client may make a false asylum claim that is supported by false or fabricated documents claiming affiliation with a political organization or ethnic group, a false arrest record, or similar false corroborating evidence.

5. Remedial Measures

The duty of candor requires that the lawyer must take "reasonable remedial measures" to prevent the introduction of false evidence or a fraud on the tribunal or to correct a falsity or fraud previously perpetuated. The phrase is not defined in the Model Rules, but Comment 10 to MR 3.3 provides guidance as to the steps to be taken to prevent, or when all else fails, expose false evidence or fraud.[25]

In particular, once the lawyer has knowledge of the false evidence or fraud, the first step is to "remonstrate" with the client confidentially. He may urge the client not to offer false evidence or to withdraw or correct it if it has been offered. There may be instances in which withdrawal of the evidence will not undo the effect of the false evidence, in which case the lawyer would need to take further action. In seeking to persuade, the lawyer should advise the client of the lawyer's duty of candor to the tribunal and ask that the client cooperate with the lawyer. If the client refuses, the lawyer may seek to withdraw from the representation. But if withdrawal is not permitted or would not otherwise undo the effect of the deception or fraud, the lawyer would have no choice but to disclose to the tribunal information sufficient to apprise it of the truth, even if it requires disclosure of client confidences.[26] At that point, it is up to the tribunal to decide how to proceed—"making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing."[27]

In the immigration context, in particular, an immigration lawyer may remonstrate with the client by explaining other avenues of relief available after making the required correction or disclosure. For example, you just learned that your client in a marriage-based application you are preparing has taken a one-day return trip across the border after he had previously entered legally with inspection and had remained unlawfully present more than 180 days. This trip created a problem because it triggered a three-year unlawful presence bar to admission. Assuming your client was legally admitted after the one-day trip, it does not create a permanent bar to admission. The client refuses to disclose the trip, insisting that an immigration officer likely would not otherwise know about his departure and return. Remonstrating with the client would include addressing the possible outcomes of disclosing the trip. The lawyer may discuss the possibility of a waiver of an unlawful presence bar under INA §212(a)(9)(B)(v) by showing extreme hardship to a qualifying relative. The lawyer could also remonstrate with the client by considering whether

[25] Comment 10 to MR 3.3 states in pertinent part that:

> [t]he advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

[26] As with all ethical questions, it is crucial that lawyers check their jurisdiction's rules. There are some states, for example, that explicitly indicate that the duty of candor to a tribunal does ***not*** trump the duty of confidentiality to a client. See the State Variations chart at the end of this chapter..

[27] *See* Comment 10 to MR 3.3.

the unlawful presence bar was satisfied by time spent already in the United States after returning from the one-day trip, and then the disclosure of the trip would be quite harmless.[28]

Remedial Measures under EOIR Rule

As discussed above, the EOIR rule against deceptive or misleading conduct involving false evidence requires the immigration practitioner to take "appropriate remedial measures, if the lawyer comes to know that she has submitted false material evidence." 8 CFR §1003.102(c). However, the EOIR rules do not define the term "remedial measures" and do not explicitly include disclosure as one of them. This may be so because the EOIR grounds for discipline make no mention of the immigration practitioner's duty of confidentiality and there is no counterpart to Rule 1.6. Absent a specific prohibition of disclosure based on a lawyer's basic duty of confidentiality, a prudent immigration lawyer should still consider disclosure as the remedial measure of last resort under the EOIR rule.

A lawyer who is admitted in a state that prohibits disclosure should check the applicable states' choice of law rules of professional conduct. Under MR 8.5, the state disciplinary authority would look to the rules of the jurisdiction in which the tribunal sits. Comment 3 to MR 8.5 states that one of the underlying premises of the choice of law rule is to assure that a lawyer's professional conduct will be subject to "only one set of rules of professional conduct." Neither MR 8.5 nor the Comments specifically addresses the question of whether a state disciplinary authority would defer to a federal tribunal's rules of professional conduct, if they differed from that of the state. Further, it is an open question as to how a state disciplinary authority would interpret the EOIR candor rule to include disclosure as a remedial measure regardless of a state's rule of confidentiality or if the EOIR would consider the rules of the attorney's state jurisdiction in determining the scope of applicable remedial measures. Under the circumstances, immigration lawyers should in the first instance be aware of whether their state rules of professional conduct prohibit disclosure as a remedial measure. If so, they should consider obtaining guidance from the appropriate bar association or an opinion from an ethics professional. Further analysis of this issue is beyond the scope of this AILA Module.[29]

6. Materiality

Certain duties of candor turn on whether statements or evidence are "material."[30] The term is not defined in the Model Rules. *Black's Law Dictionary* states that evidence "offered in a cause, or a question propounded, is material when it is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case."[31] Whether a statement or other evidence is deemed material is fact-sensitive and not necessarily directed at the outcome.[32] An example of non-material evidence might be an incorrect date, where the date is not a factor in the determination[33] or an understatement of an asset, when the asset comprises a

[28] Even though an immigration attorney or the client may consider the failure to disclose the trip as harmless, the determination of whether fraud or willful misrepresentation has occurred will be made by the officer who is also considering whether the omission cuts off a relevant line of inquiry. It may therefore be better to make the disclosure, however harmless, in order to avoid negative consequences for the client. *See* Matter of D-R-, 27 I&N Dec. 105 (BIA 2017) and section 6 below on regarding whether a misrepresentation is material.

[29] ABA MR 8.5(a) provides that the disciplinary authority in which the lawyer is admitted has jurisdiction over the admitted lawyer regardless of where the professional misconduct occurred. MR 8.5(b)(1) provides that the rules of professional conduct to be applied "for conduct in connection with a matter pending before a tribunal" shall be " the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise."

[30] In MR 3.3(a)(1), 3.3(a)(3) and 3.3(d), the information to be disclosed must be "material."

[31] *Black's Law Dictionary*: What is Material? Definition of Material, *http://thelawdictionary.org/material/#ixzz2Vjx26lcP*.

[32] *See, e.g., Colorado Bar Formal Ethics Advisory* 123, (Jun. 18, 2011) (materiality is not directed at the outcome of a matter, "but rather whether there is a potential that the information could influence a determination as to that matter"citing *In re Fisher*, 202 P.3d 1186, 1202) (Colo. 2009).

[33] *See, e.g., In re Thomas*, 962 N.E.2d 454 (Ill. 2012). In that case, the Court let stand the Review Board's determination that the lawyer did not violate Ill. Sup. Ct. R. Prof. Conduct 3.3(a)(1) when he filed an incorrectly-dated certificate of service given that the misstatements "made no difference to the proceedings before the bankruptcy court" and were not "material misrepresentations." The court declined to define "material" in light of the numerous other ethical violations committed by the lawyer.

nominal amount in comparison to total assets.[34] Where the amount of the asset affects a benefit to be conferred, it would be material.[35]

In the immigration context, the Board of Immigration Appeals (the "BIA") held that a false statement or representation is material if it has a "tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *Matter of Sparrow*, 20 I&N Dec. 920 (BIA 1994). It is not necessary to show that the misrepresentation in fact influenced the decision, only whether it was capable of affecting the government's decision. *Matter of D–R–*, 25 I&N Dec. 445, 450–451 (BIA 2011); *see also Matter of D-R-*, 27 I&N Dec. 105 (BIA 2017) (adopting the "natural tendency" test in *Kungys v. United States*, 485 U.S. 759 (1988)) issued after remand by the Ninth Circuit Court of Appeals for clarification. In *Sparrow*, the lawyer was disciplined for failure to disclose on his notice of appearance that he was under an order of suspension in states in which he was admitted. That information was material to whether he was eligible to appear before an immigration agency or court, one of the purposes of notice of appearance in the first instance. The court found that the listing of the states in which he was admitted on his letterhead was not material.[36]

In an employment-based immigration matter, a misrepresentation made to the Department of Labor (the "DOL") on the Labor Condition Application which stated that the petitioner's employee was working part-time when in fact he was working full time was found to be material to the USCIS adjudication of the I-129, even if the false statement was made solely to evade the wage requirement to the DOL, not to impact the decision of USCIS with regard to the H-1B petition. *See In re Shah*, 24 I&N Dec. 282 (BIA 2007)

Based on the above, the question of materiality depends very much on the circumstances. For example, in a marriage-based application for permanent residency, whether either of the applicants has been married previously is clearly material because it must be proven that any and all prior marriages were terminated legally.

There are other situations in which it may be more difficult to determine whether a false statement is material. For example, your client is in removal proceedings. Upon your initial intake, it appears he is eligible for Cancellation of Removal for Non-Lawful Permanent residents. This relief requires 10 years of continuous residence in the United States. An absence of 90 days or more or 180 days in the aggregate will break continuous residence. Your client tells you before a hearing before immigration court that he first entered the United States 12 years ago without permission from Mexico. He admits he left the United States five years ago to return to Mexico for a period of approximately 50 days and again entered without permission. During the first Master Calendar Hearing, in front of the immigration judge (before any written applications have been submitted), the immigration judge asks your client when he first entered the United States. Your client answers that it was 12 years ago. The immigration judge then asks if he departed from the United States after that time. Your client answers no. Knowing this is contradictory to what your client told you, you ask for a brief recess. In the hallway, you confront your client. He says he did actually leave five years ago for about 50 days, but that since he never got caught when he re-entered, the government doesn't know about it. He doesn't want to jeopardize his application and thinks that disclosing this information will do that. He thinks it's better to not say anything. In this case, your client's absence from the country was only 50 days—not the 90 days or more that would break continuous residence. While he has admitted lying, the lie does not appear to be material since a 50 day absence would not be material to the issue of continuous residence for the cancellation of removal application. However, the departure from the country likely triggers the unlawful presence bar under section 212(a)(9)(B) and the re-entry without permission 50 days later triggers the repeat violator bar under section 212(a)(9)(C). This is material to potential adjustment of status or consular processing in the future and does cut off a relevant line of inquiry. Encourage the client to correct his statement after the recess as an immediate recanting will likely avoid the consequences of the false testimony. *See Matter of Antonio Gomez-Beltran*, 26 I&N Dec. 765 (BIA 2016). If he continues to refuse disclosing the information, you might seek a

[34] *See* Colorado Bar, 123 ($5,000 differential in value of asset not material where assets total $5 million, but probably material where assets total only $20,000).

[35] *See Illinois Bar Advisory Opinion* 95-14 (concluding that a criminal defendant's concealed asset of $3,500 would be material to appointment of public defender).

[36] We note that the EOIR has instituted a formal registration procedure and the duty of candor of course will still apply. *See* 78 Fed. Reg. 19400 (Apr. 1, 2013) [Rules and Regulations] §292.1(f).

professional ethics opinion so as to protect yourself in the event this were to later be disclosed. Irrespective of whether evidence is material, whenever a client intentionally makes a false statement, a prudent and conscientious lawyer should proceed with a heightened sensitivity to any otherwise uncorroborated statements or evidence provided by the client.

C. Annotations and Commentary

> **MR 3.3(a)(1)**
>
> (a) A lawyer shall not knowingly:
>
> (1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the attorney.

MR3.3(a)(1) has two components: a lawyer cannot knowingly: (1) make a false statement of fact or law; or (2) fail to correct a false statement of material fact or law made by the lawyer.[37]

Don't Offer False Evidence

On its face, the first part of MR 3.3(a)(1) requires a lawyer to make sure that any statement of fact or law made by the lawyer is correct. A lawyer's statement in an affidavit[38] or a representation in open court "may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry."[39] For example, a lawyer may verify a pleading on behalf of a client if the lawyer knows or reasonably believes the facts are true.[40] A lawyer's duty of candor under MR 3.3(a)(1) may also apply to an omission or failure to make a disclosure, when the failure to do so is misleading or deceptive.[41] As it relates to an unintentional but material false statement made by the prosecutor in a criminal matter, one state ethics committee concluded that

[37] Comment 1 to MR 3.3 states that MR 3.3 governs conduct of a lawyer "who is representing a *client* in proceedings of a tribunal" [Emphasis added]. Nevertheless, a number of jurisdictions have disciplined lawyers under Rule 3.3(a)(1) for misrepresentations made in a lawyer's personal capacity. *See, e.g., In re Angwafo*, 899 N.E. 2d 778 (Mass. 2009) (in own family matter, lawyer misrepresented financial and marital status).

[38] The EOIR rule against false statements (8 CFR §1003.102(c)) covers any misrepresentation or deceit made knowingly or with reckless disregard of the truth. 8 CFR §1003.102(i), applies specifically to a attorney's statement as to the truthfulness or authenticity of a document by expressly prohibiting a lawyer from "knowingly or with reckless disregard falsely certifying a copy of a document as being a true and correct copy of an original."

[39] *See* Comment 3 to MR 3.3. *See also N.Y. State Ethics Op* 797 (in construing former DR 7-102(B)), lawyer who learns that client has made material false statement in affidavit must withdraw his certification that upon information and belief the affidavit contains no material misrepresentation); *FHLMC v. RAIA*, 29 Misc. 3d 1226(A) (Nassau County District Court 2010) (in foreclosure actions lawyer who verified accuracy of allegations in the petition, which were false and conclusively refuted by exhibits attached to the very same petition, was sanctioned in part on the basis of Rule 3.3(a)(1); court implicitly concluded that lawyer could not have read the petition as he had certified); *In re Chavez*, 299 P.3d 403 (N.M. 2013) (lawyer disciplined for violating N.M. 16-303(A) (analogous to 3.3(a)(1)) when he falsely stated in affidavit the reasons for seeking to withdraw, citing breakdown in attorney-client relationship when in fact he was seeking to withdraw because he had accepted a flat fee which in hindsight was too low).

[40] *See State Bar of Arizona Ethics Opinion* 03-01 (lawyer may ethically verify pleadings, but may create disqualification issues if assertions make lawyer a necessary witness).

[41] *See Ndreko v. Ridge*, 351 F.Supp. 2d 904 (D.Minn. 2004) (immigration lawyer seeking a stay of deportation failed to disclose other relevant pending actions to the judge in a TRO proceeding, in violation of Rule 3.3(a)(1) and 3.3(d). *See also In re Alcorn*, 202 Ariz. 62 (2002) (in medical malpractice action, defendant's lawyers violated Rule 3.3(a)(1) when they failed to disclose to judge that they had made secret agreement with plaintiff's attorney to dismiss action notwithstanding the intention to proceed with the trial); *American Paging of Tex., Inc. v El Paso Paging, Inc.* 95 S.W.3d 237 (Ct. App. Tx. 1999) (in determining that sanctions were warranted for bringing frivolous appeal, court also found that lawyer failed to disclose prior evidentiary hearing on similar motion, in violation of Texas Disc. Rule 3.3(a)(1)); *In re Gilly*, 110 A.D.3d 164 (1st Dep't. 2013) (lawyer reciprocally suspended for one year for knowingly submitting inaccurate export report and concealing material information from tribunal to obtain higher damages award). *See also In re Seelig*, 850 A.2d 477 (N.J. 2004) (where, under New Jersey variation of MR 3.3, lawyer is required to disclose material information which if not disclosed would mislead the court (NJ Rule 3.3(a)(5)), lawyer violated rule by failing to advise judge accepting guilty plea to reckless driving violations that client was facing parallel manslaughter charges, thereby misleading judge about double-jeopardy consequences).

defense counsel's silence did not amount to an omission of a material fact, where the correct information was ultimately disclosed by the defendant himself.[42] In the immigration context, an immigration lawyer was found to have violated MR 3.3(a)(1) when in 1999, he made misrepresentations to the INS and Board of Immigration Appeals in the representation of a client. He falsely claimed that his client had mistakenly mailed a required bond to stay deportation to the Immigration Court rather than the INS. In fact, the client had delivered the bond to the lawyer to be timely filed by him. In addition, the lawyer made misrepresentations to the BIA, supported by false documentation, in a motion to withdraw falsely alleging that the client owed him fees and that he had advised the client of his intention to move to withdraw. *See In Re Ukwu*, 926 A.2d 1106 (D.C. 2007).

If You Did, Correct It

Once the lawyer learns that his statement (or omission) is not true or accurate, the duty to correct is triggered. The second part of MR 3.3(a)(1) requires that a lawyer who knows or comes to know that the lawyer's statement is false must correct it. But not every false statement requires correction. The second part of (a)(1) qualifies the obligation to correct in that it applies only to false statements that are material.

MR 3.3(a)(1) does not refer to "reasonable remedial measures" apparently because a lawyer cannot "remonstrate" with herself. Once she knows she has made a false statement, the lawyer simply must correct it. Withdrawal of the statement without more is not an articulated option presumably because of the nature of statements lawyers are called upon to make based on their own personal knowledge.[43] In one immigration case, a lawyer was found to have violated MR 3.3(a)(1) when he falsely stated in a motion to reopen based on *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), that he had filed a disciplinary complaint against his client's former lawyer when he had only mailed a copy of the complaint to the former attorney. The lawyer did not correct the false statement, which he knew was untrue at the time it was made. *See In re Winter,* 770 N.W. 2d 463 (Minn. 2009).

MR 3.3(a)(2)

(a) A lawyer shall not knowingly: …

(2) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Disclose Directly Adverse Controlling Authority

MR 3.3(a)(2) requires that a lawyer apprise the tribunal of any controlling legal authority directly adverse to his client's position that has not otherwise been cited by the opposing party. This is a straightforward rule. The lawyer cannot knowingly fail to disclose directly adverse case law in the controlling jurisdiction that has not been cited by opposing counsel. As a matter of practice, this would mean the lawyer might first wait to see if opposing counsel cites to the case. He does not have to cite it in his opening brief. If the opposing counsel does not cite the authority, presumably through incompetence or oversight, the burden shifts back to the lawyer to inform the tribunal of the case.[44] Even if a duty to disclose adverse law does not exist, immigration counsel might disclose and

[42] *See Texas Bar Ethics Opinion* 504 (1994) (where defense lawyers were not asked by court to verify prosecutor's statement about clients prior convictions and remained silent, no violation of *Tex. Disciplinary Rule* 3.3(a)(1). Under the facts before the Texas committee, the lawyers subsequently advised their client to be truthful about his prior convictions during his probation interview and his prior convictions were revealed. Whether or not another state ethics committee would come to the same conclusion is an open question.

[43] *See Fla. Bar v. Ticklin,* 14 So.3d 928 (Fla. 2009) (lawyer who testified at bond hearing that client was not a flight risk, but changed his mind based on conversations with client, and then sent letter to the AUSA withdrawing testimony stating that he had changed his mind did not violate *Fla. Rules of Professional Conduct* 4-3.3(a)(4), analogous to MR 3.3(a)(3). There the lawyer's withdrawal of his own opinion coupled with the statement that he changed his mind was deemed a sufficient remedial measure.

[44] *See In re Thonert,* 733 N.E.2d 932 (Ind. 2000) (defense lawyer's failure to inform court of adverse decision in nearly same type of case in which the lawyer had been counsel deemed to be knowing). There may be instances in which the lawyer's knowledge of the

distinguish possibly adverse authority rather than hoping that the other side (or the court) does not identify the authority.

There is some nuance in immigration law as to what constitutes "controlling" case law. An unpublished BIA decision, even if adverse, may not be controlling legal authority, and the same is true with an AAO decision. Federal District Court decisions do not appear to be controlling, nor are Circuit Court decisions from outside the jurisdiction of the case; but Circuit Court decisions from the jurisdiction where the underlying case originated ***do*** control. A competent lawyer must be sure to check the jurisdictions that do control for adverse authority.

While MR 3.3(a)(2) does not refer to a "correction," there is an implicit ongoing duty to advise the tribunal of any omitted adverse authority which the lawyer may have discovered after further research. However, the lawyer must act promptly in that, as a practical matter, the tribunal will likely discover the authority on its own.

The lawyer's duty to disclose controlling legal authority has not been interpreted as requiring disclosure of facts adverse to the lawyer's client.[45] Nor has it been applied to cases in which a client directs his court-appointed lawyer to take an appeal as of right and the lawyer believes to do so would be frivolous because he cannot make any good faith arguments. In such cases, as long as the lawyer does not make a false statement of fact or law in pursuing the appeal, there would be no violation of the lawyer's duty of candor.[46]

EOIR

8 CFR §1003.102(s) prohibits an immigration practitioner from failing to disclose to the adjudicator legal authority in the controlling jurisdiction known to the practitioner to be directly adverse to the position of the client and not disclosed by opposing counsel. This rule mirrors MR 3.3(a)(2), except it refers to the "adjudicator" rather than the term "tribunal."

MR 3.3(a)(3)

(a) A lawyer shall not knowingly:

…

(3) Offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter that the lawyer reasonably believes is false.

When False Evidence Has Been Offered, Lawyer Must Rectify

MR 3.3(a)(3) expands the lawyer's duty of candor beyond false statements made by the lawyer. As in Rule 3.3(a)(1), the duty is not triggered unless the lawyer knows that the evidence is false and that it is material. The rule prohibits the offering of false evidence not only by the lawyer as in (a)(1), but also false evidence offered by the client or the client's witness. Lawyers have been disciplined for violating Rule 3.3(a)(3) when they knowingly submitted fabricated documents,[47] misleading documents,[48] and altered documents.[49] The knowing offer of false

adverse law is established from a witness or the lawyer's admission, but more likely it will be inferred. Thus, in the same way that a lawyer may not consciously avoid information that would establish the falsity of evidence, it would be unwise for a lawyer to attempt to avoid learning of an adverse ruling by conducting no research at all which, in most cases, could also be deemed a violation of Rule 1.1 (Competence).

[45] *See Illinois Advisory Opinion* No. 12-7 (Jan. 2012) (lawyer's knowledge that unrepresented adversary has a potential defense does not trigger disclosure obligation under Rule 3.3(a)(2)).

[46] *See A.L.L. v. People ex rel. CZ*, 226 P.3d 1054 (Colo. 2010).

[47] *See, e.g., In re Steele*, 868 A.2d 146 (D.C. 2005) (lawyer submitted a fake subpoena to excuse failure to attend pre-trial conference).

[48] *See, e.g., In re Schall*, 767 N.E.2d 976 (Ind. 2002) (lawyer submitted schedule of assets knowing they had been dissipated).

[49] *See e.g., In re Bailey*, 848 So, 2d 530 (La. 2003) (lawyer submitted altered medical report).

testimony by a prosecutor in a murder trial clearly violated Rule 3.3(a)(3) and resulted in disbarment.[50] A lawyer's reliance on the client's assertions that evidence is truthful is not a defense to a charge that a lawyer violated Rule 3.3(a)(3) when the lawyer has conclusive and reliable evidence to the contrary.[51]

What Are Reasonable Remedial Measures

The critical element of MR 3.3(a)(3) is the requirement that the lawyer take "reasonable remedial measures" when he comes to know that false evidence has been submitted by the lawyer. These measures include disclosure to the tribunal, even if the information is otherwise protected under MR 1.6. The remedial measures required under MR 3.3(a)(3) and MR 3.3(b), discussed below, are essentially the same.[52] The remedial measures apply to situations in which the false evidence has been offered and the lawyer has come to know that the evidence offered was false. MR 3.3(a)(3) makes clear that the lawyer simply cannot allow evidence he knows to be false to remain part of the record. In short, the lawyer must withdraw such evidence with the client's informed consent, withdraw from the representation in a way that rectifies the deception, or disclose its falsity to the tribunal.

As an initial matter, a prudent and conscientious lawyer will have already discussed at the early stages of the representation the need for the client to be truthful and the lawyer's ethical obligations of candor under the rules of professional conduct. It should not come as a surprise to the client that her lawyer may not knowingly offer false evidence to a tribunal. The lawyer should first confirm whether or not she has knowledge that material false evidence or statements have been presented to the tribunal. Once that is established, remedial measures should begin as soon as possible,[53] with a confidential discussion with the client explaining both the risks to the client and the lawyer's duty of candor to the tribunal. The lawyer's approach should be non-threatening to the client in the first instance, but make clear that she cannot ethically permit the tribunal to be misled. The lawyer should ask for the client's cooperation so that she can comply with her obligation of candor. If the client refuses to admit that he provided false evidence, the lawyer may need to discuss the various reasons why there is no doubt that it is false. The lawyer should explain the negative consequences to the client of knowingly offering false evidence, among them, a possibility of criminal prosecution for a perjury charge. The lawyer may appeal to the client's moral sense as well.[54] The lawyer should explain that, because of her duty of candor, the lawyer ethically cannot rely on the false evidence in argument; nor can she permit the false evidence to become part of the record on which the tribunal

[50] *See In re Peasley*, 208 Ariz. 27 (2004) (prosecutor allowed police detective to lie while testifying in two capital murder trials).

[51] *See NY County Lawyers Association Ethics Opinion* 741 citation to *In re Grievance Committee of the United States District Court*, 847 F.2d 57, 63 (2d. Cir 1988) (interpreting former NY DR 7-102, stated that required level of knowledge does not have to be "proof beyond a moral certainty" but the lawyer must "clearly know rather than suspect" the falsity of evidence before disclosure."); *Philadelphia Bar Ethics Opinion*, 2005–7 (Mar. 2005) (opinion from expert that party may have committed fraud without more does not constitute "knowledge" within meaning of Rule 3.3). *Cf.* N.C. ST. BAR 2016 FORMAL ETHICS OPINION 2 (2016) (defense counsel does not have duty under Rule 3.3 to provide notice to tribunal that law cited by client when client was proceeding pro se is no longer good law). Lawyers should always check their state's analogous candor and confidentiality rules because some state versions of Rule 3.3 do not favor candor over confidentiality. *See* State Variations section, *infra*.

[52] Under the language of MR 3.3, the duty of candor is triggered in the first instance when an attorney-client relationship has developed. *NYS Bar Opinion* 963 (Mar. 19, 2013) addresses whether there was a duty to report false evidence and criminal conduct by a prospective client who did not retain the attorney. (*See* MR 1.18(a) (duties to prospective clients include maintaining confidentiality of information learned in the consultation). The factual scenario concerned a prospective client of a legal services agency for representation with an administrative law matter. The client gave approval for the lawyer to review the record and the legal services lawyer learned that the client had filed an application under an alias, was a sex offender, and had failed to provide the correct address where he was residing in violation of the applicable sex registry requirements. On the basis that MR 3.3 only applies when an attorney-client relationship has been established and that under the circumstances presented, none had, the Committee concluded that disclosure of this information to the administrative tribunal was not *mandated* by MR 3.3. The Committee did not address the question of whether the lawyer would be *permitted* under Rule 1.6 to disclose the otherwise confidential information.

[53] *See Idaho State Bar v. Warrick*, 44 P.3d 1141 (Idaho 2002) (prosecutor who was found to have known that his witness testified falsely during the presentation of his testimony and did not take immediate remedial action after testimony to correct it, violated Rule 3.3).

[54] MR 2.1 (lawyer may refer to moral factors in advising client).

will rely in rendering a final judgment.[55] Ultimately, as discussed below, the client needs to be aware that the lawyer will inform the tribunal of the false evidence as a remedial measure.

Try Getting the Client to Agree to Withdraw False Evidence

The lawyer should seek the cooperation of the client in withdrawing the evidence or otherwise correcting it through sworn testimony. That action may create credibility problems that may weaken the client's case. It may also lead a tribunal or opposing counsel to draw an adverse inference. There may even be circumstances where withdrawal of the false evidence would by necessity require withdrawal of the underlying action altogether. If so, the lawyer would need to advise the client of those consequences as well. The lawyer should try to demonstrate to the client that the case could be successful without the false evidence or that there might be another route to a successful outcome, if that is the case. The lawyer should make sure to apprise the client of all facts relating to the decision to withdraw or correct the false evidence in order to assure that the client's decision is sufficiently informed.[56]

Threaten to Move to Withdraw or Actually Withdraw with Some Disclosure

If the client still refuses to consent to the withdrawal or correction of the evidence, the lawyer should advise the client that she would have to move to withdraw from the representation. The circumstances under which a lawyer is permitted or required to withdraw are set forth in MR 1.16.

Under MR 1.16(a), a lawyer *must* seek to withdraw if the representation will result in a violation of the Rules or other law. If, as a practical matter, the only way a lawyer can continue the representation is by giving in to the client's demand that he offer false evidence, the lawyer will violate MR 3.3. If that is the case, he must seek to withdraw with sufficient information to put the court on notice of the fraud. Comment 3 to MR 1.16(b) suggests that a statement such as "professional considerations require withdrawal" should be accepted as sufficient. But it is not clear whether that would satisfy the duty of candor under MR 3.3 if the tribunal accepts that explanation without further inquiry. For that reason, Comment 3 to MR 1.16(b) directs the reader to MR 1.6 and MR 3.3 at the end of the paragraph.

Under MR 1.16(b) a lawyer *may* seek to withdraw if, among others situations listed, withdrawal can be made without a materially adverse effect on the client [(b)(1)], the lawyer reasonably believes that the client persists in criminal or fraudulent conduct [(b)(2)], or the client has used the services of the lawyer to commit a crime or fraud [(b)(3)].[57] However, if withdrawal is not permitted by the tribunal or will not rectify the false evidence or testimony, the lawyer has not yet satisfied the requirements of Rule 3.3.

[55] Several state bar opinions provide excellent analysis and guidance on how lawyers may comply with Rule 3.3's requirement to take reasonable remedial measures to rectify the submission of false evidence or commission of a crime. *See, e.g., State Bar of Arizona Ethics Opinion* 05-05 (provides specific guidance for remedial measures, even suggesting that lawyer withdraw false evidence without client's consent); *Colorado Formal Ethics Opinion* 123 (June 18, 2011) (provides specific guidance for remedial measures, including four hypotheticals: differentiating between actual knowledge and reasonable belief that a deed is false; explaining circumstances under which a financial statement may contain a material false statement; withdrawal from representation as remedial measures when client intends to or has testified falsely; and suggestions as to manner in which disclosure can be made); *NY State Bar Opinion* 837 (Mar. 16, 2013) (indicating that New York's adoption of Rule 3.3 in 2009 constituted a major change from the prior analogous disciplinary rule (DR 7-102) which did not mandate reasonable remedial measures, including disclosure of otherwise confidential information, discusses the duty of the lawyer to refrain from voluntarily disclosing information protected by the attorney-client privilege for use as evidence against the client or other party, describes the steps to be taken by the lawyer to rectify the false evidence problem, specifically approving the withdrawal of the false evidence with the client's consent after remonstration).

[56] Under MR 1.4(b), a lawyer must explain a matter to the extent reasonably necessary so the client can make informed decisions. Although not technically required, in particularly weighty decisions like these, obtaining written informed consent to a course of action is often prudent.

[57] *See* MR 1.16 and Comments. Note that under Rule 1.16(b)(2) the lawyer must only ***reasonably believe*** that the client persists in criminal or fraudulent conduct. This creates an "escape hatch" for the lawyer to withdraw before the lawyer ***knows*** that the client has engaged in criminal or fraudulent conduct, which would trigger rule 3.3 and the obligation to take remedial measures, including disclosure to the tribunal.

Disclose as Last Resort

If the client refuses to cooperate and withdrawal would not otherwise cure the problem, MR 3.3(a)(3) requires disclosure. Comment 15 to MR 3.3 states that in a "request for permission to withdraw that is premised on a client's misconduct, a lawyer might reveal information relating to the representation only to the extent reasonably necessary to comply with [MR 3.3] or as otherwise permitted by Rule 1.6." The negative ramifications of disclosure, as a last resort, are addressed in Comment 11 as follows:

> The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal, but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

The extent of disclosure should be just enough to appraise the court that the evidence is false or that a fraud has been committed.[58] The lawyer might satisfy the disclosure requirement by simply advising the tribunal that specific evidence is false, at which time the tribunal may request more information or demand that the lawyer disclose the true facts. It is significant that, under the ethical rules, the lawyer is ***not*** permitted to provide details beyond what is necessary to remedy the false statements or evidence.[59]

Note that although a lawyer cannot knowingly offer false evidence, or knowingly make false statements, the lawyer is not necessarily required to answer any question a judge asks. For example, if a lawyer knows that a client is considering returning to the client's country of origin, and the judge asks the lawyer whether the client is willing to consider voluntary departure, the lawyer does not have to answer the question if, for some reason, it is not strategically wise to do so. Of course, the lawyer cannot give a false answer, but merely declining to answer is permissible.[60]

What if Lawyer Doesn't "Know" But Reasonably Believes that Evidence to be Offered Is False?

The last sentence of MR 3.3(a)(3) addresses a different set of circumstances. It concerns evidence that has not yet been offered and that the lawyer only reasonably believes is false. Since she does not have knowledge within the meaning of the rule, the duty of candor is not triggered. However, the last sentence of MR 3.3(a)(3) provides that the lawyer in civil cases may exercise discretion as to whether or not she will offer the evidence. The lawyer may allow the client to testify and run the risk that the testimony will come across as not credible, or perhaps create other grounds for impeachment of the testimony under cross-examination. She may also decide not to offer the false evidence despite the express wishes of her client.[61]

[58] *See, e.g., Colorado Bar Opinion* 123 ("disclosures must be limited to those that are reasonably necessary to undo the effects of the false evidence and must be made in a manner that is the least harmful to the client while satisfying the demands of Colo. RPC 3.3").

[59] *Id.* The Colorado opinion advises that if the tribunal requests further information that is clearly privileged, the lawyer should decline to provide the information unless directly ordered to do so. The opinion further advises that the lawyer may need to decide whether to seek a stay in order to challenge the order, face a finding of contempt, or comply. *See also* MR 1.6 (exceptions to confidentiality are permissive, not mandatory, and only allow disclosure against client wishes to the extent reasonably necessary).

[60] WISC. ETHICS OP. E-86-06 (rev'd 2018).

[61] In a criminal case, the defendant has a constitutional right to testify, and MR 3.3(a)(3), accordingly, does not give the lawyer discretion as to whether his client may testify when he reasonably believes (or even knows) that the defendant will testify falsely, as it does for civil matters. *Rock v. Arkansas*, 483 U.S. 44 (1987). However, a criminal defendant does not have a constitutional right to assistance of counsel in giving false testimony. *Nix v. Whiteside*, 475 U.S. 157 (1976). With these competing principles in mind, MR 3.3(a)(3) recognizes that a lawyer (handling a criminal case only) may still comply with his duty of candor by requesting the court's permission to allow the defendant to testify narratively. Comment 7 and Comment 9 taken together show how the lawyer may be in compliance with MR 3.3 and allow his client to exercise his right to testify. When the defendant testifies in narrative form, the lawyer may not elicit the false testimony through questioning and cannot rely on the false evidence in the narrative testimony in his arguments

Even though the criminal testimony exception in Rule 3.3(a)(3) does not apply in immigration hearings, familiarity with this part of the rule may be helpful in cases where an immigration lawyer has a client that has been placed in removal proceedings because of a criminal conviction. In such cases, the prudent and conscientious immigration attorney should consider consulting with criminal counsel or advising the client to consult with criminal counsel.

What Level of Diligence is Necessary When the Attorney Only Suspects False Evidence?

MR 3.3(a)(3) does not address the question of what a lawyer must do if she only suspects, has a hunch or even a gut feeling that the client or client's witness intends to offer or has offered false evidence. This may be the reaction of a lawyer who is retained as substitute counsel at the last moment or is retained after the client consulted other counsel who declined the representation. In such a case, it is unclear as to whether the lawyer is ethically obligated to probe further based on the hunch. Nothing in MR 3.3 or the comments require the lawyer to engage in an extreme degree of scrutiny.[62]

In addition, as a practical matter, any lawyer who does not make at least some reasonable effort to verify the truth of the evidence she offers, does so at her own peril. The duty of competence under MR 1.1 requires some level of reasonable investigation. In the long run, she is not helping her client either. Since knowledge may be inferred from the circumstances, a lawyer who is presented with some colorable reason to suspect that her client is not being truthful should conduct a reasonably diligent inquiry to flesh out the veracity of the client's testimony. Putting aside ethics, a conscientious lawyer would want to challenge the client in anticipation of cross-examination at trial, deposition testimony or non-sworn interviews.

In the immigration context, the lawyer may need to make her decision as to how much investigation is appropriate based on the type of case and the investigative tools available to the lawyer. The internet is a readily available resource for obtaining information about your clients or any documentation they may have provided you. For example, if it is a marriage-based case and the clients cannot provide conclusive evidence of a bona fide marriage, among other things, consider searching on social media sites to see if your clients' profiles reveal anything. If the client submits a divorce certificate that looks altered, the lawyer may check the Department of State guidelines for availability of and details regarding this type of document. If the lawyer has requested a detailed experience verification letter from the client for an I-140 petition and the client produces it two hours later (or other suspiciously short period in light of the document that is provided), the lawyer may search LinkedIn or the company website for the signatory of the letter, and attempt to contact the person, among other things.[63]

MR 3.3(b)

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

Don't Facilitate Perjury or Criminal Act Related to Proceeding

MR 3.3(b) expands the obligation of candor. When a lawyer knows that any person—not just his client—intends to engage in, is participating in, or has already committed a fraud or criminal act that relates to the proceeding, the lawyer must take reasonable remedial measures. The perpetrator of the fraud could be his client,

to the jury. Rule 3.3(a)(3)'s exception for a defendant's testimony in a criminal matter is not applicable to immigration proceedings where the burden of proof is on the foreign national and the foreign national is not subject to the same constitutional protections applicable in a criminal case.

[62] *Cf.* MR 3.1 (requiring lawyers to have a non-frivolous basis for factual and legal claims brought in a proceeding).

[63] Before contacting any individuals to confirm or deny the client's story, the lawyer must, of course, be cognizant of the confidentiality duty under 1.6 and avoid disclosing confidential information without the informed consent of the client. MR 1.6(a).

the opposing party, a witness, other counsel, court personnel, a juror, or any non-party.[64] As such, the duty is much broader than that imposed under Rule 3.3(a)(3). As in 3.3(a)(3), 3.3(b) requires the lawyer to take reasonable remedial measures, including, if necessary, disclosure to prevent or expose the fraud, after the fact. And, as is the case with the provisions of 3.3(a), the lawyer must know in the first instance that the conduct at issue is fraudulent or a crime. Comment 12 gives examples of conduct that would violate 3.3(b) and includes actions such as bribing or intimidating juror, witness or court official; or unlawfully destroying or concealing documents or other evidence.[65] Significantly, unlike the provisions of 3.3(a), mere falsity of a statement or evidence is not sufficient to trigger 3.3(b); there must be an act or omission that constitutes a crime or a fraud as defined in the relevant jurisdiction.

Reasonable Remedial Measures Same with Fraud or Criminal Act

If the fraudulent or criminal conduct has not yet occurred, then as in the case of Rule 3.3(a)(3), the first remedial measure would be to try to persuade the person not to engage in the wrongful conduct. If the person knows that the lawyer is prepared to disclose the conduct otherwise, the person may be persuaded, in which case, no further action by the lawyer would be required. MR 1.2(d) also applies to illegal or fraudulent conduct and should be kept in mind when the attorney is remonstrating with the client.[66]

If the lawyer is unable to prevent the wrongful conduct by persuasion and the client takes the illegal or fraudulent action, MR 3.3(b) requires the lawyer to disclose it to the tribunal.[67] As discussed above, once the lawyer takes such action, he may be required to seek withdrawal under Rule 1.16(b).[68]

MR 3.3(c)

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Obligation of Candor Continues Through Conclusion of Proceeding

MR 3.3(c) has two parts. The first part sets the end point for the duties imposed on lawyers in MR 3.3(a) and (b), to wit, that they continue until the "conclusion" of the proceeding. But the question of what constitutes the conclusion of a proceeding may be difficult to determine. Comment 13 recognizes the need for a "practical time limit" on the duties imposed under MR 3.3(a) and (b) suggesting that the "conclusion" of the proceeding is a reasonable end point, "*i.e.*, at the point when a final judgment has been affirmed on appeal or the time for review has passed.[69] A proceeding is thus concluded when the tribunal has completed all consideration of all facts and law, issues a ruling that is not subject to further review by any other tribunal, and implicitly no longer maintains

[64] *See Illinois Bar Op.* 95-14 (knowing failure of public defender to disclose client's fraud as to financial ability in securing free legal services of public defender, when efforts to persuade the client to rectify the fraud fail would amount to assisting client in continuing the fraud upon the court in violation of *Ill. Rule* 3.3. and thus requires disclosure); But it can also be a matter of degree. *See Waters v. District*, 935 P.2d 981 (Colo. 1997) (court-appointed lawyer in family court matter did not violate Rule 3.3 by failing to apprise court of client's change in financial ability to pay her legal fees where she did not have knowledge; attorney is not required to "undertake independent affirmative investigation" of client's financial status for purposes of accepting court appointment and where the changes that were known to the lawyer were not dispositive of the client's ability to pay and therefore not material.).

[65] MR 3.3, Cmt. 12.

[66] MR 1.2(d) provides: A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

[67] *See e.g., Florida Bar Opinion* 04-1 (2005) (after taking steps to persuade client not to commit perjury and when all attempts at remonstrating have failed, the lawyer is obligated to disclose his client's fraudulent intent to the court).

[68] *Id.* ("Absent client consent, the lawyer's disclosure of the client's false testimony or intent to offer false testimony will create a conflict of interest between the lawyer and the client requiring the attorney to move to withdraw. If the court requires the lawyer to remain in the case, the lawyer must do so. It is then up to the court to determine what should be done with the information").

[69] *See* Comment 13 to MR 3.3.

jurisdiction over the case. If the tribunal has further matters to consider in the proceeding or if the ultimate decision is subject to change depending on additional factors, the proceeding may not be deemed to have concluded.[70]

In the immigration context, it may be very difficult to estimate when a proceeding has concluded for purposes of Rule 3.3(c).[71] For example, if a client submitted material false evidence in her asylum claim, and the lawyer learns of it after the client has been granted asylum by the immigration judge, is the lawyer obligated to disclose the fraud after the fact? Assuming that the lawyer has actual knowledge of its falsity and it is material, a case can only be reopened no later than 90 days after the issuance of a final administrative order. INA §240(c)(7); 8 CFR §§1003.2(c)(2) and 1003.23(b)(1). If the lawyer has actual knowledge of the false evidence after 90 days from the final order, a lawyer could argue that the law does not allow for a motion to reopen, and thus any action will not result in a modification of the grant of asylum by the immigration judge.

However, there are exceptions to the 90-day time limitation, such as the BIA's sua sponte reopening authority under 8 CFR §1003.2(a). Also, reopening is possible when both parties, including the government, agree to reopen under 8 CFR §§1003.2(c)(3)(iii) or 1003.23(b)(4)(iv). Even after the foreign national gets lawful permanent residence, the government can start rescission proceedings within five years or place her once more in removal proceedings. And even after this client naturalizes, it is possible for the government to start de-naturalization proceedings against her on the ground that she did not properly obtain permanent residence due to the false evidence that resulted in her grant of asylum. Finally, if the lawyer is representing the client in the naturalization application, and now knows about the prior fraud in the asylum application, there is a duty to disclose this on the Form N-400, Part 12, questions 31 and 32.

Based on the foregoing, it may appear that in the immigration context, a lawyer's obligation to remedy a client's fraud or false statement, if it was made to a tribunal, could last in perpetuity. This could result in draconian results if, for example, a child or a spouse derived a green card, or even a derivative citizenship benefit innocently based on the false evidence that was submitted by the principal applicant. There are very good policy reasons to limit the obligation to the end of the proceeding, or at least when the statutory limit for filing a motion to reopen has passed. As time passes, the undoing of previously committed fraud implicates the status and rights of other people, such as spouses, children, and other relatives. Indeed, even the Board of Immigration Appeals has held in an unpublished decision, *Matter of Gumapas*,[72] that a person who became a citizen through fraud is still a citizen, and can sponsor a spouse for permanent residence.

The imposition of a limitless obligation on a lawyer would also diminish the purpose of the ethics rules themselves in preventing fraudulent representations to the tribunal. In the above example, the lawyer acted in good faith before the tribunal even though the client may have presented false evidence without the knowledge of the lawyer. Also, there are other processes in place that can rectify the situation, such as the government's ability to commence de-naturalization proceedings against her through their own investigations, without relying on the attorney to inform them. And last, there are reasons to end the obligation at the conclusion of the proceeding similar to why statutes of limitation exist. Over time, witnesses and documents may not be available and memories fade. The lack of clarity here may motivate a practitioner to secure an ethics opinion from a specialist that validates her decision not to disclose.

[70] *See New York City Bar Ethics Opinion* 2013-2 (where NY Rule 3.3 is silent as to duration of duty, City Bar Committee advised that duty continues under the following circumstances: (a) if still possible to amend, modify or vacate the prior judgment, Rule 3.3(a)(3) requires disclosure to tribunal, opposing counsel, or opposing party if opposing counsel no longer practicing law; (b) if case can be re-opened, lawyer must disclose to the tribunal to which the evidence was presented; or (c), if no longer possible to reopen, but another tribunal could amend, modify or vacate the prior judgment, then lawyer must disclose to opposing counsel, or party, if opposing counsel no longer represents the opposing party and there is no successor counsel.

[71] *See Maryland State Bar Association, Ethics Committee Docket* 2013-03 (where lawyer learns that former client committed fraud in obtaining green card 10 years ago and does not intend to represent client in the future, MR 3.3 does not require disclosure because proceeding has concluded; but if attorney were to represent client in renewal of legal residency card, MR 3.3 duty of candor applies). An excellent in-depth discussion of the example that follows this footnote is accessible at http://blog.cyrusmehta.com/2013/06/how-long-is-lawyer-obligated-to-correct.html.

[72] *Available at http://www.justice.gov/eoir/vll/intdec/indexnet97/gumpas.pdf*.

Candor Trumps Confidentiality (Up to a "Reasonable" Point)

The second part of MR 3.3(c) resolves the conflict between the lawyer's duty to disclose and the lawyer's duty of confidentiality expressed in MR 3.3(a) and (b) stating that they apply to disclosure of information otherwise protected by MR 1.6. The duty of confidentiality under MR 1.6 is very broad in that, with limited exceptions, it applies to all "information relating to the representation of a client." Under MR 3.3, however, the lawyer *must* reveal confidences to prevent the offering of false evidence or the commission of a fraud on the tribunal – but only to the extent reasonably necessary to remediate the situation.[73] In considering what extent of confidences must be revealed, the lawyer should consider not just how to make disclosure, but also the likely adverse consequences to the client, and the adverse effect on the lawyer client relationship. After the lawyer makes disclosure without client consent, the client may discharge the lawyer, the lawyer may need to seek permission to withdraw, or he may be required to withdraw. There may be circumstances where the court does not permit withdrawal and the lawyer will have to handle the case without reliance on the false testimony and deal with a very unhappy client.

MR 3.3(d)

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Duty of Candor Extends to Ex Parte Proceedings

MR 3.3(d) extends the duty of candor to appearances in *ex parte* proceedings in which the tribunal relies mainly on the information provided by the lawyer for one side of the dispute. By definition, the other side is not present. Since the lawyer is generally asking the tribunal to render some kind of decision and often on an expedited basis, *e.g.*, a TRO, rule 3.3(d) requires the lawyer to inform the tribunal of all "material facts" known to the lawyer to enable the tribunal to make an informed decision. Not to do otherwise might render the information misleading. An example of such misinformation might be representations about the procedural posture of the matter, such as the failure to disclose the pendency of a related proceeding or proof of representation.[74] When a lawyer is before a tribunal *ex parte*, MR 3.3(d) essentially requires the lawyer to present the facts any adjudicator would need to know, and presumably, that opposing counsel would disclose if she were present. MR 3.3(d) does not require that the lawyer act as an advocate for the other side, however.

In *Ndreko v. Ridge*, 351 F. Supp. 2d 904 (D. Minn. 2004) an immigration lawyer was found to have violated *Minnesota Rule of Professional Conduct* 3.3(d) in connection with a petition for Writ of Habeas Corpus and a Motion for Temporary Restraining Order seeking a stay of deportation for her client, who was already on a plane leaving Minnesota. The lawyer failed to advise the judge of a pending appeal to the U.S. Court of Appeals for the Eighth Circuit, which had previously denied the client's motion for a stay two times in the past. On the basis of the false information provided by the lawyer, the court accepted jurisdiction of the matter and granted the relief sought. The client was flown back to the United States at the government's expense when, in fact, he was subject to a valid deportation order.[75]

[73] MR 3.3 Cmt. 10.

[74] *See McIntyre V. Comm'n for Attorney Discipline*, 169 S.W.3d 803 (Ct. App. Tx. 2005) (in seeking injunctive relief in state court, lawyer falsely represented that he represented bankruptcy trustee, upon which the state court relied in granting relief, constituted violation of *Tex. R. Prof. Conduct* 3.03(3), same as MR 3.3(d)).

[75] In imposing sanctions on the lawyer, the court also found the lawyer's conduct to have violated Minn. Rules 3.3(a)(1) and 3.3(a)(3): "Rule 3.3(a) is violated when an attorney who is personally involved in ongoing proceedings before the Eighth Circuit fails to disclose the existence of those proceedings, and of directly contrary rulings by the Eighth Circuit in the same case, to a district court during an emergency hearing held at that attorney's insistence. Mattos's failure to uphold her ethical obligations as an officer of the court misled this Court into granting a motion when it was without jurisdiction to hear the case and placed it in direct contradiction with the rulings of its superior court." *Id.*

D. State Rule Variations

1. State Variations as to Duty of Candor (See California, North Dakota, New Jersey, Oregon, Tennessee, and Washington D.C.)

The rules governing the professional conduct of lawyers adopted by some states do not favor the duty of candor over the duty of confidentiality as set forth in MR 3.3(c). Indeed, several states are clear that a lawyer must hold inviolate the confidences of his client. Those states are California, Tennessee, Oregon, and the District of Columbia. In each of those states, disclosure of the false evidence or testimony is not included in the remedial measures the lawyer may take. Two other states vary somewhat from MR 3.3's duty of candor, but in different ways. New Jersey's Rule 3.3 imposes an additional disclosure obligation on the lawyer as to facts the omission of which would mislead a tribunal, regardless of whether the lawyer is appearing *ex parte* or with opposing counsel present. North Dakota's Rule 3.3 includes disclosure as a remedial remedy, but not when the false evidence is introduced through the client's testimony. Immigration lawyers in situations where the rules of the above-listed states apply should be aware of the differences. (For a more detailed discussion of the state variations, see section F).

2. State Variations as to Duration of Candor Obligations (See California, Connecticut, Florida, New York, Tennessee, Texas, and Wisconsin)

The rules governing the professional conduct of lawyers adopted by some states vary from the MR 3.3 with respect to the duration of the duty of candor. As discussed above, under MR 3.3, the duty continues until the conclusion of the proceeding. The candor rules in California, Tennessee, New York, and Wisconsin are silent as to the duration of the obligation. Florida provides that the candor obligation continues "beyond" the conclusion of the proceeding. Connecticut provides that the candor obligation continues "at least" to the conclusion of the proceeding. Texas provides that the candor obligation continues, "until remedial legal measures are no longer possible." (For a more detailed discussion of the variations, see Appendix B).

E. Hypotheticals[76]

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One

Ben, a permanent resident from Canada, hired Laura, an attorney, to assist him with a naturalization application. Ben had been a permanent resident for 10 years and had frequently traveled back and forth to Vancouver, as he lived close to the Canadian border. Ben told Laura that he could not remember all of his weekend trips to Vancouver, but estimated that he was in Canada about 2-3 days a month. Laura added up the days and determined that Ben met the physical presence residency requirements for naturalization. After Laura files the N400 with USCIS, Ben sheepishly comes to Laura's office and says that he is feeling bad about one of the questions on the form. He admits to Laura that while in college in 1984, he tried marijuana once. Ben says he hated it and never tried it again. Very concerned, Laura reprimands Ben and tells him that he violated the law in 1984, as marijuana was illegal then and still violates the federal laws today. Laura is confused as to whether to change the answer to the question that asks if the applicant has ever committed a crime for which he has not been arrested on the N-400

[76] Because the focus of this Report is the duty of candor under MR 3.3, the analysis of the factual pattern and recommendations will be based on the requirements set forth in MR 3.3. There may be instances in which even though MR 3.3 may not apply, particularly if the matter is deemed not to be before a tribunal, another rule of professional conduct may be implicated, as well as the EOIR rules.

to a yes. She decides that no one will ever find out and tells Ben to keep his mouth shut. Has Laura violated Rule 3.3?

Analysis

No, Laura has not violated Rule 3.3, because Ben's description of marijuana use in 1984 does not provide her with a sufficient level of knowledge to require her to take any action.

In determining what level of candor is required with an agency, the first question is always whether that agency constitutes a "tribunal." As noted in the Key Terms section of this Chapter, there is not universal agreement on whether an agency such as USCIS is a tribunal for purposes of Rule 3.3.[77] Certainly, it is a riskier course of action to proceed as though USCIS is not a tribunal, as there is no guarantee that a grievance body or ethics committee will agree. Either way, however, Rule 4.1 (Truthfulness in Statements to Others) and 8 C.F.R. §1003.102(c) will demand a similar level of candor.[78]

Assuming Laura is taking a more cautious approach, and treating USCIS as a tribunal, then Laura must determine whether the statement in the N-400 application is material, and if so, whether Laura knows that the statement is false. Turning first to the issue of materiality, the question is whether the alleged fact is "[o]f such a nature that knowledge of the item would affect a person's decision-making."[79] Here, Ben's commission of a crime for which he was not arrested could certainly affect USCIS's adjudication of his application, including whether he is eligible to naturalize. The apparently incorrect information is, therefore, material. But does Laura know that Ben committed a crime? There are many factors that could affect the answer to that question: Was Ben even in the U.S. at the time? If so, which state? What amount of marijuana did he have? Did he have an amount that would constitute a crime in whichever jurisdiction he was in? How is he certain it was marijuana? How old was he at the time? Each of these factors, and many others, bear on the question of whether Ben actually committed a criminal act. Laura simply does not possess sufficient knowledge regarding Ben's statement about using marijuana to require her to take any action.

This answer does raise two additional related issues. First, there is the issue of whether Laura has any obligation to dig further into the alleged marijuana use to get the answers to some of the questions above. Under Rule 3.3, she does not. While knowledge can be inferred from circumstances,[80] Rule 3.3 itself does not require a thorough investigation of every fact alleged; in fact, Rule 3.3 is phrased in the passive – the lawyer must take action where she "comes to know" that previously submitted material evidence is false.[81] The second issue Laura must still address is what to say to Ben, especially considering that he may well be re-asked the question in an upcoming naturalization interview about commission of crimes. Laura will therefore have to explain to Ben the possibility that he will be asked the crime commission question again and that he will be under oath at the interview. She will also have to explain that they can re-submit the N-400 with the crime commission box checked, as well as the risks of that re-submission.[82]

[77] *See supra* notes 10-19 and accompanying text.

[78] Rule 4.1 does differ in some significant ways from Rule 3.3. It only applies either to statements made *by the lawyer*; or to the disclosure of material facts necessary to avoid assisting a client's criminal or fraudulent act, *unless the disclosure is prohibited by Rule 1.6*. The C.F.R., on the other hand, provides no exception for disclosures that would otherwise be prohibited by Rule 1.6.

[79] BLACK'S LAW DICTIONARY (11th ed. 2019).

[80] MR 1.0(f).

[81] MR 3.3(a)(3). *But see* MR 3.1 (requiring lawyers to have a good faith basis for factual allegations made in support of their clients' positions).

[82] MR 1.4(b) (lawyer must explain matters to a client to the extent necessary for the client to make informed decisions); 1.2(d)(lawyer may discuss legal consequences of any proposed course of conduct with client). These rules will also apply to the equally fraught question of whether the lawyer can advise the client that he can answer "no" to the same question at the subsequent immigration interview. See Compendium Chapter 1.4 for a more detailed analysis.

Hypothetical Two

Maria is an applicant for adjustment of status based on a U visa. Maria hired attorney Jake to assist with the adjustment of status application. While the I-485 application was pending, Maria got drunk at a friend's birthday party and ran through a stop sign on her drive home, hitting a pedestrian and causing serious injuries. At the time of the adjustment of status interview, no charges had been filed against Maria as the felony unit was backed up. However, Maria's criminal defense attorney said that due to the seriousness of the pedestrian's injuries, she would almost certainly be charged with felony vehicular assault and DUI charges. Jake is in a quandary as to whether to reveal the pending charges to USCIS. He knows that under a USCIS policy regarding issuance of Notices to Appear, she could be referred to ICE and put in removal proceedings. He also knows that since this is her first offense, she could be a candidate for a diversion program in the criminal matter, and that such an outcome in the criminal matter would allow her to avoid the issuance of an NTA. If Maria is not asked about arrests at the adjustment interview, must Jake affirmatively reveal any information about the accident?

Analysis[83]

Jake may not have to reveal the information about the accident under Rule 3.3, assuming that Maria is not asked about arrests at the interview, and that the answers given in the I-485 were truthful at the time the application was filed. He will, however, have to counsel Maria about the possibility that her arrest and any subsequent court proceedings will be discovered by USCIS, and the potential consequences to that discovery, so that she can make an informed decision about how to proceed.[84] Although the immigration officer in this case did not ask about arrests, Jake should also have advised Maria prior to the interview that the immigration officer is very likely to ask about arrests and that Maria will have to give truthful answers to those questions. And even if the new arrest is not discovered at the time of adjustment, the failure to disclose the criminal acts and arrest that occurred prior to the adjustment interview may very well arise at the time of any subsequent naturalization.

Consequently, because the arrest question is undoubtedly material and because Jake appears to have clear knowledge of the arrest, if Maria were to give a false answer at the interview, Jake would be required to take reasonable remedial action at the time of the adjustment interview to correct the false statement. The remedial action by Jake would include first remonstrating with Maria to correct her statement herself, and then disclosing the arrest to USCIS himself if Maria will not do so. Obviously, when the arrest is disclosed by either Maria or Jake, Jake should explain the status of the criminal matter and ask for some time to report on the ultimate outcome of the case, which may be helpful to avoid the issuance of an NTA.

Hypothetical Three

Attorney Shanara is hired to represent Yonas, a client from Eritrea, right before his final asylum hearing with an immigration judge. The asylum case has a long history. Yonas initially applied for asylum more than 15 years earlier based on his involvement with the Eritrean Liberation Front before Eritrean independence. He had stated on his initial asylum application that he joined an ELF military unit when he was a teenager in 1979 and then continued his affiliation with the ELF from outside the country. After he initially filed for asylum, the government began expanding the statutory bars to relief relating to undesignated tier III groups, which has included the ELF. When Shanara is preparing him for testimony before the final hearing, Yonas explicitly confirms the accuracy of his asylum application, including his involvement with the ELF. Shanara advises him of the tier III terrorism bar and the limited group exemption for the ELF that does not apply in his case. She explains the difficult individual exemption process in removal proceedings that requires a finding of eligibility for asylum, but for application of the terrorism-related statutory bar. On cross-examination during the final hearing, Yonas denies that he had any

[83] The analysis of this hypothetical assumes the USCIS is being treated as a tribunal. As noted in the previous hypothetical, this assumption is subject to significant disagreement.

[84] MR 1.4(b) (lawyer must explain matters to a client to the extent necessary for the client to make informed decisions); 1.2(d) (lawyer may discuss legal consequences of any proposed course of conduct with client).

involvement with the ELF, explaining that the asylum preparer had fabricated this part of his claim. What actions, if any, must Shanara take?

Analysis

Shanara must take reasonable remedial action to correct the material false statement by her client. As her first course of action, she should remonstrate with Yonas privately and ask him to correct his false statement to the court. She should let Yonas know that, if he does not correct the statement himself, she will have to disclose to the immigration judge information necessary to remedy the situation, which will almost certainly include information that will make it clear that Yonas has lied under oath. Shanara can again emphasize to Yonas that his membership in the ELF does not make his asylum application impossible to achieve, though it does present some additional barriers that will have to be overcome. As the commentary to Rule 3.3 notes, the disclosure of a client's false testimony can result in "grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury." Shanara should do her utmost to avoid being forced to make that disclosure herself, rather than having Yonas correct his testimony on the record in a manner that will avoid some of these grave consequences.

Shanara may also be tempted to withdraw rather than disclose confidential and privileged information that will severely harm her client's credibility, but withdrawal is only a permissible option if it will undo the effect of the false evidence.[85] Here, a straight withdrawal without an explanation may do nothing to undo the effect of the false evidence.

Hypothetical Four

After interviewing Jacques and his wife (Susan) and reviewing their bona fides, you accept their case for representation in an adjustment of status proceeding, Form I-130, and you file the applications with your Form G-28, listing both as clients. During the preparation for the upcoming interview, you call their home. The wife's sister answers and says that she's never heard of Jacques. What are your obligations under Rule 3.3?

Analysis

The above scenario involves a situation in which you are presented with some evidence that suggests that the marriage between Jacques and his wife may not be a valid one, despite the information provided to you by them upon which you relied in good faith in the submissions to USCIS. Assuming you are taking a more cautious approach and treating USCIS as a tribunal, then the first questions are determining the materiality of the information, and what exactly it is that you "know."

Is Evidence that goes to the Issue of the Bona Fides of Your Client's Marriage Material to Your Client's Application?

Yes. While the statement from the sister who answered the phone at your client's purported home that she has never heard of Jacques is not evidence that the marriage is fraudulent, it is enough of a red flag to cause you to inquire further. You don't know enough about the sister to know whether the information she provided is true – she may be cognitively impaired, she may have language issues, she may have been "kept in the dark" by her sister, or she may have some malevolent motive in telling you an untruth. She also may be trying to protect Jacques in some way by not providing information on the phone or pretending not to know anything about him, because she knows he is undocumented. However, while her statement alone may not be material evidence of a fraudulent marriage, any evidence that Jacques and Susan do not reside together would be material to the question of whether they have a bona fide marriage, if they have previously represented to you that they do. If they don't live together, they have lied to you. If they lied to you about that, they may have lied to you about other evidence about their marriage. If that is the case, the Form I-130 application you submitted on their behalf could be based on false evidence and if

[85] MR 3.3 Cmt. 10 (withdrawal not permitted if it will not undo the effect of the false evidence).

they pursue the application under those circumstances, they will be perpetrating a fraud on the tribunal, which is also a crime. At this point, however, you do not have knowledge that the application is fraudulent.

Does the Fact that You Don't Have Actual Knowledge of a Falsity Excuse You from Having to Take Any Further Steps to Gain Knowledge?

Although no steps are proscribed under Rule 3.3, under Rule 3.1's requirement to have a good faith basis for any factual claims, and also under the duty of competency under Rule 1.1, a prudent lawyer would investigate further by speaking with her clients, and perhaps with the sister who provided the information in the first place. You also would want to undertake the investigation to avoid running afoul of the CFR's prohibition on proceeding with "reckless disregard" for the truth.[86] If Jacques and Susan staunchly deny that they have submitted false evidence, you do not have actual knowledge of the falsity, and under Rule 3.3, you need not take remedial measures. If you have only a reasonable belief that they submitted false evidence but no knowledge (actual or inferred), you have the option of continuing the representation and letting them go ahead with the interview or you could determine to seek permission to withdraw.

What if You Do Obtain Actual Knowledge of the Falsity or Fraud?

If Jacques and Susan admit that they are only good friends and that Susan had agreed to marry Jacques to help him get his green card, further action is necessary. Since you now have actual knowledge of the falsity or fraud, Rule 3.3 mandates that you take reasonable remedial measures to prevent a fraud upon the tribunal, here USCIS. You will need to persuade your clients that they cannot continue with the 1-130 based on false evidence that has already been submitted and any false statements to be made under oath at the interview. You must advise them upfront that you cannot ethically represent them in perpetrating a fraud and advise them of the consequences of marriage fraud, including a potential permanent bar to a future petition pursuant to INA §204(c). You could suggest other scenarios to assist Jacques in obtaining legal status. For example, even if Jacques and Susan lied about living together, their living apart may not undermine the bona fides of the marriage. Even an unconventional marriage may be deemed bona fide so long as the sole purpose of the marriage was not to obtain a green card. The lawyer may under the circumstances simply correct any false assertions in the Form I-130.

If they are undecided and if you believe they may come to the right decision in a short time, you might consider seeking an adjournment of the interview to give them time and perhaps to explore other possibilities for relief. You will have to reiterate your obligation to withdraw from the representation under circumstances which rectify the falsity.[87] If your clients were to insist on going forward with the application and interview without disclosing the falsity or fraud, you might have to make what has been termed a "noisy withdrawal." Whatever the term, under Rule 3.3, withdrawal from the representation will not be enough to satisfy the duty of candor if it doesn't undo the effect of the false evidence. If the withdrawal would not be effective or you are not permitted to withdraw by the tribunal, then you have no choice but to disclose the falsity to the tribunal outright. You should explain the ramifications of such disclosure as to any further relief for Jacques if the falsity is exposed, as well as the potential criminal liability for both Jacques and Susan. Disclosure can be attempted by a letter to the appropriate USCIS representative and should be on notice to your clients. The letter should indicate that you are acting under the requirement of your state's professional conduct Rule 3.3 (assuming it mandates disclosure) and the EOIR rule. The letter should only contain the amount of information and details reasonably necessary to notify the USCIS that your client's application is based on materially false information or is fraudulent.

Hypothetical Five

After successfully completing an interview on their I-751 application to remove the conditions on permanent residence, you observe your clients in the parking lot of the USCIS district office, shaking hands, exchanging money, and going off in separate cars. What action, if any, must you take?

[86] 8 CFR § 1003.102(c).

[87] Withdrawal is also an option when the lawyer has only a reasonable belief that an application is fraudulent and does not feel comfortable continuing the attorney-client relationship under MR 1.16(b). As previously discussed, if the lawyer only has a reasonable belief of a falsity, MR 3.3 does not impose a duty of candor.

Analysis

The interchange between your clients, if taken in the light most *unfavorable* to them, could possibly be evidence they engaged in a fraud, in particular, that the beneficiary of the marriage-based application paid the other spouse to engage in the fraud. It raises the question of whether the conduct you observed requires you to engage in further inquiry as to the bona fides of the marriage. It also raises a question of timing—since under Rule 3.3, the duration of the duty of candor continues until the conclusion of the proceeding. If the officer's approval of the application at the interview concludes the process and there are no further actions to be taken or matters to be reviewed by the tribunal—here USCIS—the matter would be deemed concluded and the lawyer would have no further duty to disclose a fraud since under the rule, the duty ends when the matter is concluded. But the facts of what you observed in this scenario, without more, are so ambiguous and subject to a perfectly reasonable explanation it would be hard to even characterize the interchange as a red flag. In this case, a prudent lawyer could justify making no further inquiry of your clients about the bona fides of the marriage.

Hypothetical Six

You represent a small business owner in preparing and filing a labor certification for his friend based on an offer of future employment as a project manager. The friend has H-1B status through a different employer. You explain that there must be a bona fide, permanent job opening available to U.S. workers, and that the owner must have the intent to hire the friend and the friend must have the intent to work for the owner after being approved for permanent residence. The business owner pays your fee and completes the recruitment, and you submit the labor certification application. After the labor certification application is approved, before filing the I-140 petition and I-485 application, the friend asks you how long he needs to work for the business owner. The business owner and the friend admit after further discussion that the labor certification was filed as a favor. They intend to work together only as long as necessary; that the friend will take a leave of absence and then return to his current employer. What action, if any, must you take?

Analysis

This scenario presents a situation in which after you have completed the first requisite step of an employment-based green card application—approval of the labor certification application—your clients provide you with information which causes you to question whether they have the required intent at the time of filing to work together on a permanent or non-temporary basis. You are concerned that they may have committed a fraud on the Department of Labor in that there was no real offer of employment. Nevertheless, they expect you to file the I-140 petition and I-485 application with USCIS.

Assuming that you are taking a more cautious approach, and deeming USCIS and DOL to be "tribunals" in the context of the application,[88] then the next question under Rule 3.3(b) is whether or not you have "knowledge" of fraudulent conduct by your client or other person.

Do You Have Actual Knowledge of the Material Fraud Triggering the Duty of Candor under MR 3.3?

Yes. While there is no requirement that the worker remain in the position forever, or even for more than one year, there must always be the intent during the application process for the worker to assume the position on a permanent basis. Your clients have freely admitted that they do not intend to abide by the commitments provided in the Labor Certification and the applications to be submitted to USCIS. They have instructed you to submit the papers nevertheless. You have a duty to take remedial measures to prevent your clients from continuing their fraudulent conduct and, in effect, seeking your assistance in perpetrating a fraud.

[88] *See supra* notes 10-19 and accompanying text.

What Remedial Measures Should You Take?

You will need to speak to both the employer and the beneficiary to assess their intent regarding an offer of permanent employment and advise them about your ethical obligations under Rule 3.3.[89] The offer of employment must be legitimate. Not only may you not assist them in perpetrating a fraud on the tribunal by filing the I-140 and I-485, you are also under an obligation to advise the tribunal of the fraud should they decide to file the application pro se or with the assistance of other counsel, since the matter would still be pending and not have been concluded within the meaning of Rule 3.3. You must advise that even if you withdrew from the representation, you would be under an obligation to provide the tribunal with information sufficient to apprise them of the fraud.

Since in this case, the fraudulent conduct is based on the intentions of the employer and the beneficiary, the fraud can be remedied in one of two ways. The clients can decide not to pursue the matter with USCIS and let the Labor Certification expire after 180 days or attempt to withdraw the certification from DOL. In the alternative, they can agree to comply with the commitments they made going forward, as they have not yet filed the I-140 and I-485, and such an agreement, if genuine, would arguably render the previous misrepresentation to the DOL immaterial. In the event the clients decide to continue with the fraud, disclosure by the lawyer can be made by letter to USCIS and should be on notice to your clients.

F. Chart of Variations by State

State Name	Variation(s)
Alabama	Alabama does not include disclosure to the tribunal as an example of reasonable remedial measures a lawyer might be required to take upon discovering that previously offered material evidence is false. Alabama does not include a provision requiring a lawyer to correct a false statement made by the lawyer's client or witness. Alabama explicitly excludes grand jury proceedings from the lawyer's duty to inform a tribunal of adverse material facts in *ex parte* proceedings.
California	California does not apply Rule 3.3 to situations where compliance would require the attorney to disclose information otherwise protected by Rule 1.6. California adds a prohibition against knowingly misquoting a book, statute, decision, or other authority to a tribunal. California requires disclosure of material adverse facts in an *ex parte* proceeding only where notice to the adverse party is not given and the adverse party is not present.

[89] For purposes of the hypothetical, we are assuming that your clients have consented to dual representation encompassing this discussion. Under MR 1.8, however, it is possible that continued dual representation would be prohibited. *See* MR 1.8, Cmt. 29-31.

State Name	Variation(s)
Connecticut	Connecticut does not include any provision allowing the lawyer to refuse to offer evidence the lawyer reasonably believes is false. Connecticut adds a provision requiring a lawyer to promptly notify the trial judge of juror discussion or conduct that violates the trial court's instructions.
District of Columbia	The District of Columbia does not apply Rule 3.3 to situations where compliance would require the attorney to disclose information otherwise protected by Rule 1.6.
Florida	Florida does not include a provision exempting the testimony of defendants in criminal proceedings from the lawyer's discretionary refusal to offer evidence that the lawyer reasonably believes is false.
Georgia	Georgia does not include a provision exempting the testimony of defendants in criminal proceedings from the lawyer's discretionary refusal to offer evidence that the lawyer reasonably believes is false. Georgia excludes grand jury proceedings from the lawyer's duty to inform the tribunal of adverse material facts in *ex parte* proceedings. Georgia does not include an explicit provision requiring a lawyer to correct false evidence offered by the lawyer's client or witness.
Hawaii	Hawaii does not include disclosure to the tribunal as an example of reasonable remedial measures a lawyer might be required to take upon discovering that previously offered material evidence is false. Hawaii does not include a provision requiring a lawyer to correct a false statement made by the lawyer's client or witness. Hawaii excludes grand jury proceedings and applications for search warrants from the lawyer's duty to inform a tribunal of adverse material facts in *ex parte* proceedings.
Maine	Maine adds a prohibition against knowingly misquoting a book, statute, ordinance, rule, or decision that the lawyer knows to be invalid. A lawyer also may not cite as authority a decision that was overruled, or cite a statute, ordinance, or rule that has been repealed or declared unconstitutional.

State Name	Variation(s)
Maryland	Maryland does not include an explicit provision requiring a lawyer to correct false evidence offered by the lawyer's client or witness. Maryland does not include a provision exempting the testimony of defendants in criminal proceedings from the lawyer's discretionary refusal to offer evidence that the lawyer reasonably believes is false.
Massachusetts	Massachusetts includes additional provisions containing extensive direction on how to proceed where the issue involves false testimony of a client in a criminal proceeding.
Michigan	Michigan does not include a provision requiring a lawyer to correct a false statement made by the lawyer's client or witness. Michigan adds a provision describing the lawyer's obligations under Rule 3.3 when the duty of candor conflicts with the duty of confidentiality, requiring the lawyer to first seek to persuade the client not to offer false material evidence, and to immediately disclose the nature of the evidence if it has already been offered. If persuasion is ineffective, the lawyer must take "reasonable remedial measures" such as withdrawing from representation if that will remedy the situation. If the lawyer is not permitted to withdraw, he must make such disclosures "reasonably necessary to remedy the situation," even if such disclosures would reveal information otherwise protected by Rule 1.6. Michigan does not include a provision allowing the lawyer to refuse to offer evidence the lawyer reasonably believes is false.
New Jersey	New Jersey does not include disclosure to the tribunal as an example of reasonable remedial measures a lawyer might be required to take upon discovering that previously offered material evidence is false. New Jersey does not include a provision requiring a lawyer to correct a false statement made by the lawyer's client or witness. New Jersey does not include a provision exempting the testimony of defendants in criminal proceedings from the lawyer's discretionary refusal to offer evidence that the lawyer reasonably believes is false.
North Dakota	North Dakota does not apply Rule 3.3 to situations where compliance would require the attorney to disclose information over the client's objection, if the false evidence is contained in the client's testimony. North Dakota does not include a provision allowing the lawyer to refuse to offer evidence the lawyer reasonably believes is false.

State Name	Variation(s)
Pennsylvania	Pennsylvania extends the duty of candor to "ancillary proceedings" such as depositions, provided that they are conducted "pursuant to a tribunal's adjudicative authority."
South Carolina	South Carolina extends the duty of candor to "ancillary proceedings" such as depositions, provided that they are conducted "pursuant to a tribunal's adjudicative authority."
South Dakota	South Dakota requires that in a criminal matter the lawyer "shall not participate" in the client's presentation of testimony which the lawyer knows to be false. South Dakota excludes grand jury proceedings and applications for search warrants from the lawyer's duty to inform tribunal of adverse material facts in *ex parte* proceedings.
Tennessee	Tennessee does not include disclosure to the tribunal as an example of reasonable remedial measures a lawyer might be required to take upon discovering that previously offered material evidence is false. Tennessee includes additional provisions containing extensive direction on how to proceed where the issue is false testimony of a client in a criminal proceeding. Tennessee requires that a lawyer who knows of improper conduct by or toward a juror or a member of the jury pool before the conclusion of the proceeding report that conduct to the tribunal, even if such disclosure involves information protected by Rule 1.6.
Texas	Texas does not include disclosure to the tribunal as an example of reasonable remedial measures a lawyer might be required to take upon discovering that previously offered material evidence is false. Texas' duty of candor extends until "remedial legal measures are no longer reasonably possible." Texas does not include a provision allowing the lawyer to refuse to offer evidence the lawyer reasonably believes is false.

State Name	Variation(s)
Virginia	Virginia does not include disclosure to the tribunal as an example of reasonable remedial measures a lawyer might be required to take upon discovering that previously offered material evidence is false. Virginia does not include a provision requiring a lawyer to correct a false statement made by the lawyer's client or witness. Virginia does not include a provision exempting the testimony of defendants in criminal proceedings from the lawyer's discretionary refusal to offer evidence that the lawyer reasonably believes is false.
Washington	Washington does not apply Rule 3.3 to situations where compliance would require the attorney to disclose information otherwise protected by Rule 1.6.
Wisconsin	Wisconsin does not specify the duration of the duty of candor.

American Immigration Lawyers Association

AILA ETHICS COMPENDIUM

ABA MODEL RULE 4.1
TRUTHFULNESS IN STATEMENTS TO OTHERS

Sherry K. Cohen, Reporter

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MODEL RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

Introduction

Editor's Note: Compared with the other chapters of the Compendium, the analysis of Model Rule 4.1 is not all-inclusive. The discussion in this chapter addresses the obligations concerning candor and serves as a supplement to the chapter on Model Rule 3.3.

MR 3.3 is not the only professional responsibility rule that involves candor. Model Rules, such as MR 8.4(c) (prohibiting fraud or intentional misrepresentation in any context) or MR 1.2(d) (counseling or assisting client in commission of fraud or crime) may overlap with MR 3.3 which, as discussed, covers candor in a matter before a tribunal. Because it is not settled law that agencies such as the DOL, USCIS and DOS are "tribunals," for purposes of MR 3.3,[1] immigration lawyers must also be familiar with the obligations concerning candor under MR 4.1.[2]

A. Text of Rule

ABA Model Rule 4.1 Truthfulness in Statements to Others

To review the full text of MR 4.1 and the comments, please visit the *Model Rules of Professional Conduct: Table of Contents* on the American Bar Association's website.

B. Annotations and Commentary

A major difference between MR 4.1 and MR 3.3 is that MR 4.1 covers misrepresentations made to any third person, not just a tribunal as in MR 3.3.[3] A major difference between MR 4.1 and MR 8.4(c) is that MR 4.1 requires candor only in the course of representing a client, not generally. Like MR 3.3(a)(3) and MR 3.3(b), MR 4.1 applies to a lawyer's conduct in the course of representing a client. Like those sections of MR 3.3, MR 4.1 requires that a lawyer disclose information that is otherwise protected under MR 1.6.

MR 4.1(a)

> **MR 4.1**
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or

The first prong, MR 4.1(a), prohibits a lawyer from "knowingly" making "material" false statements to *any* third party.[4] A false statement may also arise from an omission of a fact that renders a partially true statement misleading.[5] In the immigration context, MR 4.1(a) would apply if a lawyer knowingly

[1] See New York State Bar Ethics Op. 1011 (7/29/14) (concluding that visa and work permit applications before the DOL do not involve matters before a tribunal since they do not involve presentation of evidence or legal argument before a "tribunal; " lawyer therefore is not required to comply with disclosure requirements under Rule 3.3).

[2] As in the case of MR 3.3, state versions of MR 4.1 may vary and lawyers are advised to check the applicable state version of MR 4.1. Notably, California which has never adopted the model rules has no rule requiring disclosure of client information and only permits (but does not require) disclosure in very limited circumstances, i.e., cases in which the failure to do so would result in bodily harm or death. See Summary of State Variations below.

[3] Reference to EOIR rules regarding truthfulness to [any person] in connection with immigration matter discussed above.

[4] See discussion of "knowledge" and "material" as defined by the model rules above.

[5] Comment 1.

provided false financial information to the DOL[6] about the employer as to its ability to pay the beneficiary's salary. Since this false information would be material to the application and the lawyer submitted it knowingly, the lawyer's conduct would violate MR 4.1(a)(1).[7] If the same immigration lawyer had only a reasonable belief that the employer's financial information was false, she would not violate MR 4.1(a)[8] because MR 4.1(a) is similar to MR 3.3(a)(1) in that it applies only to knowingly false statements.[9] MR 4.1(a) is notably different from MR 3.3(a)(1) in that it does not require disclosure when the lawyer learns of the falsity after the fact.

Immigration lawyers, like others, may be subject to disciplinary sanctions for violating MR 4.1(a). A Minnesota immigration lawyer was found to have violated both MR 3.3(a) and MR 4.1(a) when he submitted a "Lozada" motion to which he attached a copy of a purportedly filed disciplinary complaint against the former counsel. Upon receipt of the motion, the formal counsel prepared an extensive answer only to learn at a later date that the complaint had never been filed with the disciplinary authority. In the disciplinary action, based on the former lawyer's complaint, the Court found that the inclusion of the unfiled disciplinary complaint in the motion amounted to a false statement by the lawyer that violated MR 3.3(a) (since it was submitted to the BIA, a tribunal) and MR 4.1(a) (since it was submitted to the former lawyer, a third person).[10] In another disciplinary case, a Pennsylvania immigration lawyer engaged in a series of fraudulent acts in an attempt to conceal his total neglect of a client's case by, among other things, making false statements in emails, letters and in telephone conversions about the status of the matter, and was found to have violated MR 4.1(a), among other rules.[11]

MR 4.1(b)

> **MR 4.1(b)**
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Whereas, MR 4.1(a) does not impose a duty to disclose false information (as does MR 3.3(a)(1)), the second prong, MR 4.1(b) does require disclosure of materially false factual information to a third person when necessary to avoid assisting the client in committing a fraud or a criminal act. Unlike, MR 3.3—which in effect requires candor over confidentiality irrespective of MR 1.6—MR 4.1(b) disclosure of otherwise confidential information is required only when the failure to do so would amount to assisting a client in a fraud or crime. This scenario is addressed in two of the six exceptions to the duty of confidentiality in MR 1.6(b), which provides that a lawyer may (but is not required to), disclose confidential information in order to prevent the client from committing a crime or fraud or to prevent,

[6] For the purposes of this section on MR 4.1, we will assume that the DOL, USCIS and the U.S. Department of State are not deemed a tribunal under the model rules.

[7] Lawyers are advised to check the applicable state version on MR 4.1. There are some states for example, that change the "knowingly" standard to "knows or reasonably should know."

[8] See discussion of the term "reasonable" in EC MR 3.3.

[9] MR 3.3(a)(1) provides that a lawyer "shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

[10] In re Winter, 770 N.W.2d 463 (Minn.2009)(sanction?); see also In re Apt, 946 P.2d 1002 (Kan. 1997)(lawyer used document in such a way as to render it a false statement when in connection with sale of deceased client's home, lawyer presented deed executed before client's death to conceal fact that sale occurred after client's death).

[11] Matter of Max Ernst, Disciplinary Bd. Pennsylvania, No. 178 DB 2013 File No. C1-12-600 (March 10, 2014).

mitigate or rectify injury to another already caused by the client's commission of a fraud or crime in a matter in which the client used the lawyer's services.[12] Accordingly, MR 4.1(b) takes certain disclosures that are permitted under MR 1.6(b) and makes them mandatory.[13] MR 4.1(b) and MR 3.3 differ in that the text of MR 4.1(b) does not explicitly require a lawyer to take "remedial action" to prevent a client from making a material misrepresentation in furtherance of a fraud or crime which would include convincing the client to correct the misrepresentation or otherwise rectify the fraud. However, there is no reason to conclude that a lawyer could not take remedial action short of disclosure in order to comply with MR 4.1(b). For example, if, as a result of the lawyer's remedial action—such as advising the client of his disclosure obligations under MR 4.1(b)—the client agrees not to commit the fraud or crime, there is nothing that the lawyer needs to disclose. If a lawyer is unsuccessful in that way, then under MR 4.1, the lawyer would have to disclose the false statements to whom they were made. As specified in Comment 3 to MR 4.1, a lawyer may avoid assisting a client's fraud or crime by withdrawing, but would need to take further action if the withdrawal without more information was not "sufficient".

In the immigration context, a lawyer would violate MR 4.1(b) if, after learning that his client provided him with false information material to a particular avenue of relief and incorporated into a pending application, the lawyer failed to disclose the false information. Specific examples might be false employer financial information in a labor certification petition, concealment of a prior common law marriage in marriage-based residency petition or concealment of prior arrest in a DACA matter.[14]

There may be overlap between MR 4.1(a) and MR 4.1(b) when a lawyer's statement is rendered false or misleading by virtue of an omission of fact.[15] Under such situations, the failure to disclose is equivalent to an affirmative misrepresentation that can have the effect of assisting the client in committing a fraud or criminal act.[16]

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

C. Hypotheticals

Hypothetical One: Picking and Choosing Legal Advice: Don't Confuse Me with the Facts

Jay is a US lawyer admitted in a state that has adopted the Model Rules, including MR 3.3 and MR 4.1. He practices U.S. immigration law in London and deals a lot with the US Embassy in London.[17] The London U.S. Embassy has erected a policy, based on space limitations in its

[12] As noted in Comment 3 to MR 4.1(b), this prong is essentially an application of the principle set forth in MR 1.2(d). For a comprehensive analysis on MR 1.6, see EC chapter on 1.6 on pp. 5-1.

[13] It should be noted that the MR 1.6(b) exceptions that permit disclosure apply to circumstances in which the lawyer only "reasonably believes necessary" to prevent the crime, as opposed to the wording in MR 4.1(b) which requires disclosure "when necessary. " The different wording would not affect the obligation to disclose under MR 4.1(b). If a lawyer would not violate MR 1.6(b) by disclosing confidential information she reasonably believes is necessary to prevent a fraud or crime, she could never be violate MR 1.6(b) by disclosing confidential information that was "necessary" to prevent the fraud or crime.

[14] See Phila. Bar Ethics Op. 2002-3 (father's failure to disclose prior criminal conviction in immigration matter involving other family members amounted to a fraud requiring that lawyer disclose omission under MR 4.1(b), if matter not deemed to be before a tribunal [here legacy INS] or MR 3.3(a)(4) if the matter were deemed to be before a tribunal.).

[15] Comment 1 to MR 4.1.

[16] ABA, a Legislative History: The development of the ABA Model Rules of Professional Conduct, 1982-2005), at 522 (2006).

[17] Generally, a lawyer admitted in only one state is required to comply with the rules of that state, unless there are choice of law issues not present here. See MR 8.5.

waiting area, of no lawyer representation in the Embassy, or appearances at interviews. Peter has come to Jay for a consultation after submitting his non-immigrant visa application for a B visa/ visitor visa ("visa") online. Peter asks Jay to review his DS-160 and help him present the best evidence in support of the visa. Since Jay would not be able to appear physically at Peter's interview anyway and to keep Jay's fee low, Peter does not want Jay to file a notice of appearance or otherwise have his name to appear anywhere on the materials that he would submit to the U.S. Embassy. He just wants "advice". After the initial consultation with Peter, Jay discovers that Peter had a criminal conviction for drunk driving five years ago arising from a routine traffic stop. Peter was breath-alyzed and found to have blood alcohol levels that were not extremely high, but sufficient to establish statutory drunk driving. No one was injured, but Peter received a conviction for drunk driving with no jail time.

Because Peter wanted to avoid any potential delay in obtaining the visa, also believing the conviction was stale and no longer part of his criminal record, he chose not to disclose the conviction on the DS-160. Jay tells Peter that the failure to disclose the criminal conviction would amount to a fraud on the Department of State and that he should therefore amend the application and disclose the conviction as required. Peter says he will think about it. The next day Peter speaks to Jay and tells him that he still doesn't want to disclose the conviction on the application or bring any papers to the interview concerning the conviction. He has confirmed, after speaking with a friend, that when the U.S. Embassy in London learns that a B visa applicant has had a criminal conviction for drunk driving, it would require Peter to meet with a panel physician to determine if Peter has a mental health problem—here, alcoholism—that would make him inadmissible at that time. Peter does not want the delay of having to go to a panel physician and he is also concerned that the panel physician might find a mental health problem based on Peter's occasional difficulty controlling his drinking and recent bouts of depression, for which Peter has sought treatment. As an alternative to what Jay has advised, Peter tells Jay he wants to limit Jay's involvement in the visa matter only to legal advice about supporting evidence, unrelated to anything to do with the conviction. If Jay refuses, Peter will proceed pro se.

Analysis

What Model Rules are implicated by Peter's failure to disclose his criminal conviction on the DS-160 and intention to conceal it in further pursuit of the visa?

MR 3.3 would be implicated if the B visa/visitor visa application is deemed a matter before a tribunal. However, as discussed above, it is not settled law that the DOS is a tribunal as defined by MR 1.0(-) Assuming that the DOS is not a tribunal, MR 4.1 would then be implicated since it applies to false statements made to any third party in connection with the representation of a client. MR 1.2(d) would also be implicated as well for reasons discussed below.

Assuming that the DOS is not a "tribunal" under the Model Rules, since MR 4.1 applies, is Peter a client within the meaning of MR 4.1"

Yes. Peter comes to Jay for a consultation concerning a pending visa application he filed pro se. Although there is no indication in the scenario that he has formally retained Jay, a lawyer-client relationship still exists between Jay and Peter, since Peter has come to Jay for legal advice and Jay has provided at least some. The first important piece of legal advice Jay provides to Peter is that his failure to disclose his prior conviction is a false statement which must be rectified. While it may be correct that

Peter did not come to Jay for advice about that particular issue, he came to Jay for assistance is obtaining the visa. If Peter's fraud were discovered, his visa would be in jeopardy on the basis of his dishonesty alone, and he might also be subject to criminal consequences for filing a false statement with a government entity. The lawyer-client relationship between Jay and Peter triggers the duty of confidentiality under MR 1.6 on one hand, but as discussed below, it may also trigger a duty of disclosure under MR 4.1 on the other. In order to determine if Jay is subject to the duty of disclosure under MR 4.1(b), we need to determine if Jay is "representing" Peter in a matter.

Is Jay representing Peter for purposes of MR 4.1?

Whether or not Jay is "representing" Peter within the scope of MR 4.1 is less clear, and would depend on whether Jay agrees to provide the assistance that Peter has come for in the first instance, i.e., to provide advice going forward about gathering the best evidence in support of the Visa. In essence, Jay would be agreeing to limit the representation which is permitted generally under MR 1.2, as long as the lawyer is not assisting the client in committing a fraud or crime. However, as noted in Comment 10 to MR 1.2, if Jay drafted or delivered documents that he knew were fraudulent, or as in this case helped Peter obtain the visa by providing legal advice, knowing that Peter was committing fraud, he would be doing exactly what MR 1.2 (d) prohibits: assisting the client in conduct that the lawyer knows to be fraudulent. If Jay agrees to go along with Peter's terms and limit the representation solely to the best evidence to support the visa, Jay is representing Peter under MR 4.1.

If Jay tells Peter he cannot agree to the kind of limited representation he proposes, Jay would not be representing a client under MR 4.1 and would not be subject to the disclosure requirements of MR 4.1(b).

What are Jay's options under MR 4.1 if he decides to "represent" Peter in pursuing the visa?

The ethical course for Jay to follow, if he wants to avoid assisting Peter in the commission of a fraud, is to tell Peter he cannot comply with the request to limit the representation solely to advice about the best evidence supporting the visa, because at a minimum that would cause Jay to violate MR 1.2(d). Limiting the representation in accordance with Peter's proposal would also amount to an improper end run around MR 4.1(b).

Jay should also explain that if he agreed to represent Peter under the proposed terms, under MR 4.1(b) Jay would be duty bound to disclose Peter's false statement, which obviously would have the effect of jeopardizing Peter's ability to obtain the visa and expose Peter to criminal liability. Under MR 1.16(a), Peter also would be required to withdraw from the representation because of the conflict of interest created by Jay's duty to disclose Peter's fraud. If Peter still insisted on concealing the drunk driving conviction, Jay would have to advise Peter that he must decline Peter's request for legal services in connection with the Visa, since MR 1.16(a) also requires a lawyer to "decline" representation under these circumstances.

As discussed above, if Jay does not agree to go forward in providing legal advice to Peter beyond what he has already provided at the consultation, MR 4.1 would not apply and Jay would not be required to disclose Peter's conviction to the DOS.

As a practical matter, what actions should Jay consider to protect against accusations that he engaged in unethical conduct?

If Jay and Peter are going to part ways, best practice for Jay would be to prepare a "non-engagement" letter to Peter confirming that Jay has declined Peter's request for limited representation in pursuing the Visa.

Hypothetical Two: When Duty of Loyalty, Confidentiality and Truthfulness Collide: Can't the Lawyer "Wink" Every Once in a While?

Jennifer is a lawyer admitted in a state that has adopted the Model Rules. She has been retained by Smith Construction ("Smith"), which is doing work for BargainTown, a national chain, at one of its locations in the state. She is to conduct an audit of its Form I-9 files for the worksite location. BargainTown has a previous settlement with the Department of Homeland Security that requires it to make sure that BargainTown's contractors and sub-contractors use a legal workforce on all of their worksites and comply with employment eligibility verification rules.

The worksite audit -- at the contractor's expense -- is a requirement of the BargainTown Master Agreement for all contractors on the BargainTown worksite. Jennifer reads the Master Agreement executed between BargainTown and Smith and finds that BargainTown requires that audit lawyers like Jennifer issue their reports directly to BargainTown. Accordingly, Jennifer obtains from Smith a written confidentiality waiver permitting her to reveal the results of the audit directly to BargainTown's Compliance Officer, in accordance to their agreement with BargainTown.

Jennifer works with Smith site manager to get all the Form I-9s for the workers present on a particular day. She prepares the audit report for direct issuance to BargainTown. The report indicates that some of the workers had not properly completed Form I-9s that day and Form I-9s for other employees at the worksite were missing altogether. Before submitting the report, she shows it to Smith, which is displeased with the report. The company president reminds Jennifer that Smith – not BargainTown --is her client and she needs to do what's best for them. He asks her to omit from the report her findings concerning the improperly filed and missing Form I-9s.

Analysis

What Model Rules are implicated by Smith's request that Jennifer submit an essentially false audit report to BargainTown?

Since the representation does not involve a matter before a tribunal, but one involving false representations to a third party, MR 4.1 would clearly be implicated. MR 1.2, which prohibits a lawyer from assisting a client in committing a fraud is also implicated, as is MR 1.16 which requires a lawyer to withdraw when continuing representation would result in violation of a professional responsibility rule.

What are Jennifer's options under MR 4.1 and the other implicated rules?

There is no doubt as to the identity of the client here or that Jennifer is clearly representing Smith for purposes of MR 4.1. She has been formally retained. The only variance from typical circumstances is that Smith, in a contractual agreement with a third-party, has agreed that its lawyer provide the audit report directly to the third-party, Bargain Town. Obviously, this contractual obligation has been included so that BargainTown can have the greatest assurance that its contractors, here Smith Construction, provide truthful I-9 audit reports.

Under MR 4.1(a), Jennifer is prohibited from making a false statement to a third-party in the course of representing a client. Doctoring the audit results, as requested by Smith, is exactly the kind of conduct that MR 4.1(a) prohibits. Accordingly, Jennifer must refuse Smith request and if Smith is bent concealing facts from BargainTown, Jennifer would be required to withdraw under MR 1.16(b).

As discussed, MR 4.1(a) does not require disclosure of Smith intent to commit fraud, but under MR

4.1(b) Jennifer cannot allow Smith to use her services to commit a fraud or crime, and must therefore disclose their intention to do so. Since she has already done the work under her retainer, Jennifer would either have to withdraw in such a way that discloses the fraud to BargainTown or disclose to BargainTown and then withdraw as required under MR 1.16(b). It is a distinction without a difference.

Are there other options?

While MR 4.1(b) does not require or even make reference to "remedial action," since disclosure would be required under MR 4.1(b), as a practical matter, Jennifer should explain to Smith Construction that one way or the other, BargainTown is going to learn of Smith Construction's fraud, which could have both civil and criminal consequences.

Because no immigration lawyer would want to be faced with this predicament, best practice would have been for Jennifer to discuss this issue at the onset of the representation. In particular, Jennifer could have included language in her engagement agreement setting forth what would happen if her audit results were adverse to Smith. This would be a natural extension of the confidentiality waiver which Jennifer had already received in writing.

Such language in a retainer agreement would clearly have a chilling effect on any improper motive on Smith conduct, but even such language is not a guarantee that a client would not attempt to engage in wrongful conduct. Ultimately, that is what the professional rules are about and MR 4.1 is no exception.

American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 4.3
Dealing with Unrepresented Person

Theo Liebmann, Reporter

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MODEL RULE 4.3 DEALING WITH UNREPRESENTED PERSON

Introduction and Background

Immigration lawyers deal with unrepresented persons in a wide variety of contexts. They may need to work with non-clients to obtain an affidavit of support as part of a client's application to adjust status;[1] work with family members of a client to obtain important background information for a family-based petition;[2] have extensive contact with a client's employee where the client is sponsoring the employee for an employment-based visa;[3] or obtain sworn statements or other evidence from friends and family of a client to prove eligibility for a variety of humanitarian-based applications for immigration relief.[4] The legal interests of the unrepresented persons in these and many other situations can be different from and, in some cases, in direct conflict with the interests of the client.

Example: Lawyer represents Client in an I-130 family-based petition. Client's Brother will be Client's sponsor. As Brother is filling out the I-864 Affidavit of Support, he asks Lawyer's advice on the best way to answer the questions about salary, given that some of Brother's income was not reported to the I.R.S. What is Lawyer permitted to say to Brother?[5]

Example: Lawyer represents Child Client. Child Client was detained when he crossed the border and has provided Lawyer with the phone number for his Aunt. Lawyer calls Aunt, who says she is willing to sponsor Child Client while his removal proceedings are pending. Aunt asks Lawyer the extent of her potential exposure to adverse immigration actions. Can Lawyer ask Aunt her immigration status? Can Lawyer explain the extent of Aunt's exposure to her? Can Lawyer advise Aunt on her options to minimize her exposure?[6]

In both of these examples, as in many situations, contact with the unrepresented persons is crucial to the lawyer's obligations to pursue the clients' goals competently and zealously. Yet there are clearly potential legal consequences to those persons' participation in the clients' matters. Model Rule 4.3, the primary rule relating to dealings with unrepresented persons, describes the parameters for engaging in such contacts ethically.

Rule 4.3 has three key mandates when a lawyer is dealing with unrepresented persons on behalf of a client: 1) the lawyer cannot state or imply disinterest; 2) the lawyer must correct any misunderstanding by the unrepresented person about the lawyer's role; and 3) the lawyer cannot give legal advice, other than the advice to secure counsel, if the interests of the person and the client are in conflict, or have a reasonable possibility of being in conflict. The application of these mandates is considerably broad. They apply to all unrepresented persons (witnesses, parties, etc.), and to all forms of communication, when a lawyer is dealing on behalf of client. In both examples above, therefore, Lawyer must ensure the unrepresented party is clear about Lawyer's role. And in both examples, Lawyer cannot give advice, other than the advice to obtain a lawyer, if Lawyer knows or reasonably should know that the interests of her Client and the unrepresented party are in conflict – a fact-specific determination that will require additional inquiry by Lawyer.

[1] USCIS Form I-864.
[2] E.g., USCIS Forms I-129; I-130, Part 4 "Information About Beneficiary".
[3] E.g., USCIS Form I-140.
[4] Asylum and U-Visa claims, for example, typically require corroborative evidence from sources who may have their own stake in the outcome.
[5] One possible way to avoid this particular dilemma is to represent both the sponsor and the beneficiary. *See* Cyrus D. Mehta, *Representation of the Joint Sponsor on an I-864 is Both Permissible and Prudent*, 22 BENDER'S IMMIGRATION BULLETIN 565 (May 1, 2017) (suggesting that joint representation of the beneficiary and the sponsor both avoids 4.3 problems, and does not typically involve conflict of interest issues). *But see* Greg McLawsen and Gustavo Cueva, *The Rules Have Changed: Stop Drafting I-864s for Joint Sponsors*, 20 BENDER'S IMMIGRATION BULLETIN 1287 (Nov. 15, 2015) (concluding that lawyers should stop drafting I-864s for co-sponsors).
[6] *See infra* n. 29 and accompanying text for a discussion of these hypotheticals.

Rule 4.3 is not the only rule relevant to dealings with unrepresented parties. Rule 4.1 prohibits lawyers from making false statements of material fact or law to a third person.[7] Rule 3.4 prohibits lawyers from asking a non-client to refrain from giving information to another party, except under certain circumstances.[8] And Rule 1.13 cautions lawyers for organizations to clarify with the organization's constituents the lawyer's role whenever the lawyer knows, or reasonably should know, that the interests of the organization and the constituent are adverse.[9]

The rules for contact with ***represented*** parties are much more stringent than those for contact with unrepresented parties. Under Rule 4.2, a lawyer is permitted to contact a person she knows is represented only where the lawyer has the consent of the person's lawyer, or is authorized to do so by law or court order.[10] While the stricter guidance of Rule 4.2 only applies where the lawyer has actual knowledge that the person is represented, that knowledge can be deemed inferred from the circumstances.[11]

The rest of this chapter will give the text of Rule 4.3 and relevant portions of related rules; provide annotation and commentary; analyze a series of hypotheticals based on realistic scenarios that immigration lawyers may encounter; and describe key state rule variations from the Model Rule.

A. Text of Rule

ABA Model Rule 4.3 – Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Comment—Model Rule 4.3

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

[2] The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms

[7] MR 4.1.
[8] MR 3.4(f).
[9] MR. 1.13(f).
[10] MR 4.2. This prohibition only covers communications regarding the subject of the representation. *See* 4.2 cmt. 4.
[11] MR 4.2 cmt. 8; MR 1.0(f) (definition of "Knowingly," "known," and "knows"). *See infra* nn. 12 to 19 and accompanying text for further discussion of duties regarding contact with represented parties.

on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

Relevant Portions of Related Rules

Rule 1.13, Organization as Client, Comment 10

There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

Rule 3.4(f) (Fairness to Opposing Party and Counsel)

A lawyer shall not…
(f) request a person other than a client to refrain from voluntarily giving relevant information to another party...

Rule 4.1(a) (Truthfulness in Statements to Others)

In the course of representing a client a lawyer shall not knowingly:
(a) make a false statement of material fact or law to a third person…

Rule 4.2 (Communication with Person Represented by Counsel)

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

B. Annotations and Commentary

When is a Person "Represented" in a Legal Matter?

Rule 4.3 only applies where a lawyer has contact with a person who is ***not*** represented. Rule 4.2 provides significantly stricter protections for represented persons – an absolute prohibition on contact absent consent from the person's lawyer or a court order. The question of when a person is considered represented thus significantly impacts the lawyer's obligations.

In determining which Rule applies, an important factor is the subjective knowledge of the lawyer herself. Because Rule 4.2 only applies when the lawyer *knows* the person is represented, the lawyer may treat the person as unrepresented absent that knowledge.[12] As with any subjective provision of the Rules, however, lawyers should exercise caution in using lack of knowledge as a defense, since the Rules clearly state that "knowledge" may be inferred from circumstances.[13]

[12] Id. Cmt. 9.
[13] MR 1.0(f).

COMPARISON CHART OF RULES 4.2 & 4.3	Consent Requirement	Subject Matter of Communication	Use of Third Party to Engage in Communication
Rule 4.2 Represented Persons	Unless a lawyer is authorized by law or court order to contact a represented person, ***the consent of the person's lawyer is required.***	A lawyer may only speak with a represented person about matters for which she has permission from the represented person's lawyer.	Not permitted, except that a lawyer may advise a client concerning communications with a represented party that the client is legally entitled to make.
Rule 4.3 Unrepresented Persons	Unless a lawyer is explicitly prohibited by law or court order from contacting an unrepresented person, ***there is no consent requirement.***	A lawyer may speak with an unrepresented person about all matters, so long as the lawyer's role has been made clear, and the lawyer does not offer legal advice, beyond the advice to obtain a lawyer, if the interests of the lawyer's client and the unrepresented person are in conflict, or there is a reasonable possibility of conflict.	Permitted, if there is no use of deceit or misrepresentation by the third party.

Whether or not a person is represented in a legal matter is not necessarily self-evident. For example, when an agency is represented by a lawyer, its employees may or may not be represented by that lawyer as well, depending on the circumstances. Rule 4.2 instructs that a constituent of an organization who "supervises, directs, or regularly consults with the organization's lawyer concerning the matter…" is considered represented for purposes of communications if the constituent.[14] Rule 4.2 also unequivocally states that former employees are not deemed to be represented by the organization's lawyer.[15] This leaves out, of course, the vast number of employees who are not in a supervisory-type role in relation to the matter, but continue to work at the organization. Neither Rule 4.2 nor 4.3 provides guidance on the status of these employees, though cases identify the existence of an actual agreement on the part of the contacted employee to representation by the organization's lawyer as the key factor.[16]

Example: Lawyer represents Client in an application for an employment authorization document (EAD). The EAD application has been pending for 9 months, and Lawyer files a mandamus complaint in federal court on behalf of Client to compel a determination on the application. The defendants are the Secretary of Homeland Security, the Director of USCIS, and the Director of the relevant USCIS service center. Lawyer wishes to contact the supervising immigration officers at the relevant USCIS service center about the typical timeline for EAD applications in order to gather information for the mandamus action. May she do so?

[14] MR 4.2 Cmt. 7. Comment 7 also prohibits communications with an organization's constituents where the constituent has the authority to "obligate the organization with respect to the matter" or the constituent's "act or omission in a matter could be attributed to the organization for purposes of civil or criminal liability." *See also* MR 1.13 Cmt. 2 (the fact that a lawyer for an organization has a duty of confidentiality regarding conversations with the organization's employees "does not mean… that constituents of an organizational client are the clients of the lawyer.").

[15] Id.

[16] *See, e.g., Brown v. St. Joseph Cnty.*, 148 F.R.D. 246, 250 (N.D. Ind. 1993) (hospital personnel deemed unrepresented where hospital failed to demonstrate that there was any agreement they were represented by its counsel).

In the example above, unless the supervising officers regularly consult with USCIS' Office of Chief Counsel (OCC) about this case in a manner that indicates some decision-making role, or there is an actual agreement between OCC and the supervising officers that they are being represented, Lawyer can contact the officers. Lawyer must of course still observe the guidance of Rule 4.3 for her interactions with the officers.[17] This includes refraining from giving legal advice to the officer other than the advice to speak with OCC, though explaining the officer's legal obligations in the context of advocating for a client is of course permitted.[18]

Where the USCIS officer is not deemed represented, and where there is no action like the *mandamus* action above that creates an adversarial relationship, Rule 4.3 appears to allow not only interaction, but also advice on complying with the officer's legal obligations. In this case, because the mandamus action has created an adversarial posture, Permissible actions, though explaining the legal obligations of USCIS and advocating for a client are, of course, permitted and even ethically required.

The question of the line between represented and unrepresented also frequently arises in the context of limited scope representation. In general, a party is considered unrepresented for any matters or issues that are outside the scope of the representation agreement, although there is some variation among states.[19]

Example: Lawyer One works at a legal services office that, among other things, assists individuals who are alleging domestic violence against their spouses, and who are seeking to file orders of protection against their spouses in family court. All clients of the office sign a retainer that limits the scope of representation to assisting and advising clients on properly completing and filing petitions for orders of protection. Lawyer One represents Client and, consistent with the retainer agreement, assists Client in preparing and filing her petition for an order of protection against her husband, who is in the process of applying for a green card. Client appears pro se at all ensuing court appearances. Lawyer Two, who represents Husband in his application to adjust status, learns about the family court case from Husband. Lawyer Two is very concerned about the consequences to Husband if the family court case proceeds. Can Lawyer Two speak with her client's wife to inform her about the potential consequences to Husband and to ask her not to proceed?

Since the scope of representation here was only to assist the Client in preparing and filing the order of protection, Client is not considered represented during the court proceedings, unless she retains subsequent counsel. Therefore, as long as Lawyer Two clearly represents her role, and does not give her client's wife any advice other than the advice to secure counsel, consistent with Rule 4.3, she can engage in the communications.[20]

[17] Even if there were circumstances where the officers were considered represented parties, Comment 5 of Rule 4.2 could still possibly permit communications with them. MR 4.2, Cmt. 5 ("Communications [with a represented party] authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government").

[18] *See infra* nn. 42 – 52 *and accompanying text.*

[19] *See infra* section on State Variations.

[20] A *pro se* litigant getting limited legal assistance on some aspects of case is generally still considered unrepresented. *See, e.g.* D.C. ETHICS OP. 330 (2005)("When a lawyer provides only limited or behind-the-scenes assistance to a litigant who has filed *pro se*, opposing counsel cannot be expected to be aware of the lawyer's involvement. In such a situation, opposing counsel acts reasonably in proceeding as if the opposing party is not represented, at least until informed otherwise"); KAN. ETHICS OP. 09-01 (2009)(lawyer can communicate with unrepresented person even where lawyer had received document from person stating "Prepared with Assistance of Counsel"); NEV. ETHICS OP. 34 (2009)(person being assisted by a "ghost-lawyer" is considered unrepresented).

"Dealing on Behalf of a Client"

Model Rule 4.3 only applies when a lawyer is engaging with an unrepresented *person in the course of representing a client.*[21] For example, a CEO who happens to be a licensed attorney but who is not acting in his capacity as a lawyer, can communicate with employees of an opposing party.[22] Similarly, when a lawyer is acting as a "director of risk management" for a hospital, but the hospital and lawyer do not have a lawyer-client relationship, the lawyer is not "dealing on behalf of a client" when she negotiates with hospital patients and others.[23]

Example: Lawyer serves as the Executive Director for a non-profit community center for recent immigrants. Some of the immigrants who utilize the community center have joined together to sue the local police department for the police department's cooperation with requests by ICE to detain any immigrant who has a removal order. The immigrants are not represented by Lawyer, but in her role as Executive Director, Lawyer organizes a demonstration in support of the immigrants litigating the case. At the demonstration, Lawyer has an extensive heated conversation with the police department commissioner about the policies.

Because Lawyer is not interacting with the police commissioner on behalf of a client, she is not bound by Rule 4.3. Any deceit or misrepresentation in her interactions, however, could still implicate Rule 8.4(c) and (d), which do not include any "on behalf of a client" requirements.

Clarifying the Lawyer's Role

Rule 4.3 creates protections for an unrepresented party from lawyers who might try to take advantage of the party's lack of legal knowledge. One significant protection for unrepresented parties is clarity on the nature of the lawyer's role. The Rule creates explicit obligations that a lawyer not state or imply that the lawyer is disinterested, and that when the lawyer knows or reasonably should know that an unrepresented person misunderstands the lawyer's role in the matter, that the lawyer make reasonable efforts to correct the misunderstanding. Both obligations require a nuanced determination by the lawyer on the impact of her words and actions toward the unrepresented person, as well as an acute awareness of the rules in her jurisdiction. The bar for improper implication of disinterest is generally fairly high, for example, and requires an intentional implication of disinterest to constitute an ethical violation.[24] However, this view is by no means universal, as at least one state has found that even merely omitting an explicit description of the lawyer's role in the legal matter – in other words, even silence on the lawyer's role – impermissibly implies disinterest.[25]

Similarly, while there is agreement on some principles with respect to role clarification, the permissible methods and extent of clarification required varies considerably. As a general matter, a lawyer should try to correct any misunderstanding about her role whenever she realizes, or should realize, that such a misunderstanding exists. [26]

[21] MR 4.3 (emphasis added).
[22] *HTC Corp. v. Tech. Props. Ltd.*, 715 F.Supp.2d 968 (N.D. Ca. 2010).
[23] CONN. INFORMAL ETHICS OP. 2010-02 (2010).
[24] *In re Jensen*, 191 P.3d 1118, 29 (Kan. 2008) (no 4.3 violation where witness misunderstood lawyer's role, but lawyer did not intentionally imply disinterest); *In re Katrina Canal Breaches Consol. Litig.*, 2011 WL 651946, Civ. No. 05-4182 (E.D. La, May 14 2008) (no 4.3 violation where investigators hired by lawyer only stated worked for private investigation firm, but not that working on behalf of lawyer); OR. ETHICS OP. 2013-189 (rev. 2016) (lawyer can request access to social media of non-represented party where "no actual representation of disinterest is made by Lawyer").
[25] *See* N.H. ETHICS OP. 2012-13/05 (2013) (simply omitting nature of lawyer's involvement in a litigated matter creates implication of disinterest).
[26] *In re Millett*, 241 P.3d 35 (Kan. 2010) (lawyer who accompanied client's brother to police interview should have realized that client's brother misunderstood lawyer's role); *In re Faraone*, 722 A.2d 1 (Del. 1998) (lawyer for buyers should have realized sellers of property misunderstood lawyer's role when they asked about their potential liability); N.Y. CITY BAR OP.

And a lawyer may not deliberately mislead an unrepresented person about the lawyer's role, either explicitly or implicitly.[27] The Comments to the Rule state a lawyer will "typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person."[28]

Consider the two examples from the introduction to this chapter:

Example: Lawyer represents Client in an I-130 family-based petition. Client's Brother will be Client's sponsor. As with any sponsor, Brother may have significant financial obligations if the application is successful. What must Lawyer say to Brother about her role?[29]

A proper description of Lawyer's role here requires, at a minimum, two elements. First, Lawyer should explain that she represents Client. Second, Lawyer must correct any perception by Brother that Lawyer is representing Brother's interests, including where that perception is one that Lawyer should "reasonably" have detected.

Example: Lawyer represents Child Client. Child Client was detained when he crossed the border and has provided Lawyer with the phone number for his Aunt. Aunt expresses concern about her exposure to adverse immigration consequences if she becomes a sponsor. What must Lawyer say to Aunt about his role?

A proper description here requires, again, a clear explanation to Aunt that Lawyer represents Child Client, and a correction of any reasonably detectable impression by Aunt that Lawyer has any responsibility or duty to protect Aunt's interests. In both of these examples, the only permissible (though not required) advice is for the party to obtain counsel.

One other example highlights how Rule 4.3 plays out in the context of unrepresented respondents in removal proceedings:[30]

Example: Lawyer represents the government in removal proceedings against pro se Respondent. The government is seeking removal because Respondent, a lawful permanent resident, has been convicted of a drug-related offense. Lawyer knows that there may be a waiver available due to the relatively minor nature of the offense; Lawyer also knows that having Respondent agree to Voluntary Departure would mean that the case could be disposed of more easily. After the initial appearance in immigration court, Lawyer sees Respondent in the courthouse hallway. What must Lawyer say about her role before having any conversation about the case with Respondent?

2009-2 (2009) (lawyer must explain role to unrepresented person where person "objectively manifests her misunderstanding of a lawyer's role").

[27] Id.

[28] MR 4.3 Cmt. 1.

[29] As noted *supra*, a possible way to avoid this particular dilemma is to represent both the sponsor and the beneficiary, though that may create other problems. *See* Cyrus D. Mehta, *Representation of the Joint Sponsor on an I-864 is Both Permissible and Prudent*, 22 BENDER'S IMMIGRATION BULLETIN 565 (May 1, 2017) (suggesting that joint representation of the beneficiary and the sponsor both avoids 4.3 problems and does not typically involve conflict of interest issues). *But see* Greg McLawsen and Gustavo Cueva, *The Rules Have Changed: Stop Drafting I-864s for Joint Sponsors*, 20 BENDER'S IMMIGRATION BULLETIN 1287 (Nov. 15, 2015) (concluding that lawyers should stop drafting I-864s for co-sponsors).

[30] A study completed in 2016 found that only 37 percent of all respondents in removal cases were represented, and only 14 percent of detained immigrants were represented. *See* Ingrid Eagly and Steven Shafer, *Access to Counsel in Immigration Court*, (American Immigration Council, Sept. 28, 2016), *available at* https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

Before any conversation about waiver, Voluntary Departure, or any other aspect of the case, Lawyer must explain that she represents the government, her role is to seek Respondent's removal, and she has no duty to protect Respondent's interests.[31]

Beyond the identification of the client, the clarification of any misunderstanding, and an explanation of any conflicting interests, the extent of "clarification" required varies.[32] Published opinions provide different guidance to lawyers across different jurisdictions, and an awareness of the opinions in the applicable jurisdiction, or even affirmatively seeking out guidance from a state bar association, are frequently the safest ways to ensure a lawyer does not overstep an ethical line.

Investigators and Others Acting on the Lawyer's Direction

Immigration lawyers, as most other lawyers, often work with investigators, paralegals, law student interns, and other non-lawyers. Lawyers may direct these non-lawyers to conduct fact investigations that include contact with unrepresented parties, and a lawyer's ethical responsibility when non-lawyers deal with unrepresented parties at the lawyer's direction may be slightly different than when a lawyer herself makes the contact.[33] Neither Rule 4.3 nor the Rule's Comments address this issue, and there is some disagreement in particular on whether investigators and others sent out by a lawyer need to identify themselves, whom they work for, and the lawyer's role.[34] As a general principle, although a lawyer need not necessarily require investigators working on her behalf to disclose that fact to an unrepresented party, outright deception on the part of an investigator or other person would cause the lawyer to be in violation of Rules 8.4(a) and (c), if not Rule 4.3.[35]

Example: Lawyer represents Client in a Violence Against Women Act (VAWA) petition. Client says that, while she has left the home of her abusive husband, he still has her passport. Lawyer asks her paralegal to contact the Client's husband and, without saying where the paralegal is calling from, arrange to have the passport sent to a P.O. box where Client can pick it up. The paralegal calls the husband and says she is calling for "immigration purposes" and says the husband "should immediately send" Client's passport to the P.O. box. The paralegal does not disclose that she is calling on behalf of Lawyer or Client.

[31] The Model Rules also create additional obligations for prosecutors with respect to defendants, including prohibitions on seeking waivers of important pretrial rights, or pursuing cases not sufficiently supported by the evidence, as well as affirmative duties to ensure an accused is aware of certain rights. MR 3.8. Although these rules do not explicitly apply to government lawyers in other contexts such as removal proceedings, the dire consequences of removal create a strong argument that they should.

[32] *See supra* nn. 23-25.

[33] Contact by a non-lawyer with a ***represented*** party at the lawyer's direction, however, involves the same ethical duty under Rule 4.2 as if the lawyer herself were making the contact, unless the non-lawyer making contact is the client. *See* MR 4.2 Cmt. 4.

[34] *Compare In re Katrina Canal Breaches Consol. Litig.*, 2011 WL 651946, Civ. No. 05-4182 (E.D. La, May 14 2008) (no violation where investigators, though not fostering impression they were there to help unrepresented parties with whom they had contact, also did not disclose to unrepresented parties that they were working on behalf of a lawyer); *with* D.C. ETHICS OP. 321 (2003) (ethically permissible for lawyer's investigator to contact unrepresented party in domestic violence case so long as effort is made by lawyer to ensure unrepresented party understands role of lawyer and investigator), PHILA. ETHICS OP. 2009-02 (2009) (lawyer using third party to "friend" unrepresented witness on social media does not implicate Rule 4.3, though use of deception does violate Rule 8.4); COLO. ETHICS OP. 127 (2015) (agent of lawyer who contacts unrepresented party via social media must disclose name of lawyer requesting access, that lawyer acting on behalf of a client, and general nature of legal matter). *See generally* David Isbell & Lucantonio Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct*, 8 GEO J. LEGAL ETHICS 791 (1995).

[35] Id. MR 8.4(a) (professional misconduct for lawyer to assist or induce another in violating an ethical rule); 8.4(c) (professional misconduct for lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation).

The fact that the paralegal undertook this action will not provide cover for Lawyer. Not only did the Lawyer affirmatively instruct the paralegal to withhold information about paralegal's affiliation with Lawyer, in violation of Rule 4.3, she also violated Rule 5.3, regarding her duty to ensure others under her supervision do not commit ethical violations, and Rule 8.4(a) and (c).[36] Had Lawyer instructed paralegal to explain she was calling from Lawyer's office, and then to correct any perceived misunderstanding about Lawyer's role as Client's legal representative, there would be no ethical violation here.

Contacts Through Social Media

The means for contact between lawyers and unrepresented parties have never been more varied and numerous. The rise of social media, especially, has exponentially expanded the mediums for possible contact, and consequently dramatically increased the use of social media in client representation. Social media can be an excellent investigative tool, for example, for locating individuals who can provide additional evidence in support of various immigration applications. Or it can simply serve as an efficient way to contact persons who are necessary for various aspects of representation, such as the provision of an affidavit of support. It is not surprising, then, that there are a wealth of ethics opinions on social media contact with unrepresented parties. Most opinions indicate a clear distinction between merely viewing the public portion of a person's social media account and requesting access to view restricted portions. Viewing a publicly available portion of a social medial account generally does not require a lawyer to identify herself in any manner to the party.[37] For portions of a social media account that are private and require a request to access, however, states vary. Some jurisdictions require that the lawyer requesting access include an explicit statement that the lawyer is acting on behalf of client,[38] or a general description of the legal matter, or general nature of the matter.[39] Others only require that the lawyer use her full name and not dissemble.[40] In all jurisdictions, the use of deceit, when requesting access to a person's social media account, is impermissible.[41]

Example: Lawyer is representing Client in an asylum matter. Client is claiming that he is being persecuted due to his sexual orientation and provides copies of threats made to him on his social media account to Lawyer. In order to assess the source of the threats more thoroughly, Lawyer goes on to the social media accounts of the individuals making the threats and requests access to non-public portions of the accounts. Lawyer gives her name when making the request but does not provide any other information. Lawyer's requests are accepted, and she uses much of the information she finds on the private portions of the account to establish the government ties of the individuals making the threats.

Lawyer's viewing of the public portions of the accounts are not problematic. For access to the private portion, Lawyer gave the minimum amount of information about herself – her name – that is required in some jurisdictions. In other jurisdictions, as noted *supra*, Lawyer would have been required to give additional information. The safest

[36] *See also* MR 5.3 (Responsibilities Regarding Nonlawyer Assistance"); MR 8.4(a) and (c).
[37] KY. ETHICS OP. E-434 (2012); MAINE ETHICS OP. 217 (2017); OR. ETHICS OP. 2013-189 (rev. 2016); N.H. ETHICS OP. 2012-13/05 (2013).
[38] COLORADO COLO. ETHICS OP. 127 (2015) (lawyer must provide her name, must disclose acting on behalf of client, and must disclose general nature of matter which lawyer asking for information about.); MASS. ETHICS OP. 2014-5 (2014) (lawyer must disclose identity as lawyer for party when requesting access to personal website); N.H. ETHICS OP. 2012-13/05 (2013) (lawyer must include identifying information and involvement in the legal matter).
[39] COLORADO COLO. ETHICS OP. 127 (2015).
[40] N.Y.S. BAR ASSOC. SOCIAL MEDIA ETHICS GUIDELINES 16 (2015) (lawyer can request permission to view restricted portion of social media site or profile, and must use full name and accurate profile, but need not disclose reason; but if person asks for additional information from lawyer in response to request, lawyer must accurately provide information or withdraw request); OR. ETHICS OP. 2013-189 (rev. 2016) (lawyer need not identify self as lawyer or explain lawyer's role unless person asks for that info, or there is reason to believe person misunderstands role).
[41] MR 8.4(c); 4.1(a). N.Y.S. BAR ASSOC. SOCIAL MEDIA ETHICS GUIDELINES 16 (2015); N.Y. CITY BAR OP. 2010-2 (2010); MAINE ETHICS OP. 217 (2017); OR. ETHICS OP. 2013-189 (rev. 2016).

course of action, if Lawyer were in a jurisdiction without an opinion or other guidance on this issue, would be either to request an opinion from Lawyer's state bar association prior to making a request of this kind, or to disclose her name and her role as a lawyer in a legal matter when making the request.

Providing Legal Advice to an Unrepresented Person

When an unrepresented person has interests that are adverse to the lawyer's client, the lawyer may not give legal advice beyond the suggestion that the person obtain counsel.[42] When there is no reasonable possibility of conflict, however, Rule 4.3 itself does not include any direct limitation on advice to the unrepresented person. Other Rules, such as 4.1(a) and 8.4(c), prohibit false statements, misrepresentations, deceit, and dishonesty in a dealing with any third person, including unrepresented persons.[43]

Rule 4.3 has an expansive view of what constitutes permissible advisory-like interactions on legal matters with an unrepresented person. Even with an unrepresented person whose interests are adverse to the lawyer's client, a lawyer may inform the person of her client's terms for a settlement or agreement, may prepare documents for the person's signature, and may explain the lawyer's view of a document's meaning or even the party's underlying legal obligations within a document, so long as the lawyer explains that she represents an adverse party and does not represent the unrepresented person.[44] Although the Rule does not explicitly so state, advice of this nature is presumably considered more akin to the communication of "legal information" about a matter, rather than the provision of "legal advice" on what course of action the lawyer suggests.[45] Under the Comments to the Rule, the context, and experience and sophistication of the person are also relevant factors in determining whether the line between permissible and impermissible advice has been crossed.[46] Courts have made similar distinctions, typically holding that an exchange does not constitute impermissible advice unless it involves substantive guidance.[47] A lawyer's motive and candor toward the unrepresented person also figure strongly into the analysis of many courts; the more deceptive the lawyer about her role, and the more there appears there is an intent to deceive about that role, the more likely the advice will be deemed impermissible.[48]

Example:[49] Lawyer represents Child Client. Child Client was detained when he crossed the border and has provided Lawyer with the phone number for his Aunt. Lawyer calls Aunt, who says she is willing to sponsor Child Client while his removal proceedings are pending. Aunt says she is a recent immigrant and asks Lawyer the extent

[42] MR 4.3 Cmt. 2.
[43] MR 4.1(a); 8.4(c).
[44] Id.
[45] Maine's version of Rule 4.3 makes this distinction explicit. *See* ME. R. PROF. RESP. 4.3 ("The lawyer shall not give legal advice to an unrepresented person, but may provide legal information to and may negotiate with the unrepresented person."). This distinction is also discernible in the types of "advice" a client is entitled to from a lawyer. *Compare* MR 1.4(b) ("A lawyer shall ***explain*** a matter to the extent reasonably necessary to permit the client to make informed decisions…) (emphasis added), with MR 2.1 ("In representing a client, a lawyer shall… ***render candid advice***.") (emphasis added).
[46] MR 4.3 Cmt. 2.
[47] *Compare Hanlin-Cooney v. Frederick Cnty.*, 2014 WL 576373, Civ. No. WDQ-13-1731 (N.D. Md. 2014) (statement by plaintiff's lawyer to defendant that defendant "would be covered by insurance" not impermissible legal advice); *with Hopkins v. Troutner*, 4 P.3d 557 (Idaho 2000) (upholding trial court determination that defense counsel's answer to unrepresented plaintiff's question "how much is this case worth" constitutes impermissible legal advice.) *See also* N.Y.C. BAR OP. 2009-2 (2009) (lawyer may provide unrepresented party with "incontrovertible" information about, *inter alia*, existence of legal rights).
[48] *Att'y Q. v. Miss. State Bar*, 587 So. 2d 228 (Miss. 1991) ("don't worry about it" was impermissible legal advice when defendant automobile owner asked plaintiff's lawyer if she should contact her insurance company); *Yates v. Belli Deli*, 2007 WL 2318923, No. C 07-01405 WHA (N.D. Cal. 2007) ("friendly advice" from plaintiffs' firm to small businesses that they settle claims under American with Disabilities Act quickly and not hire lawyers was impermissible legal advice).
[49] This fact pattern is an extended version of the second hypothetical in the introduction to this chapter.

of her potential exposure to adverse immigration actions. Lawyer knows that sponsors for minors in removal proceedings are being fingerprinted and has heard that some sponsors without status are being placed in removal proceedings. Lawyer worries that Aunt may not have status, and if he discloses this information to Aunt, she will back out of sponsorship. Lawyer tells Aunt, without asking about her status, that she probably has nothing to worry about.

Lawyer's comment to Aunt that she has nothing to worry about is a violation of Rule 4.3. Aunt's likely level of experience and sophistication, given her status as a recent immigrant, as well as Lawyer's lack of complete candor about potential risks, make this interaction problematic. Lawyer's proper interaction with Aunt would involve explaining Lawyer's role as the Child Client's advocate, and then either simply telling Aunt to speak with her own lawyer to answer questions about her own risks, or informing Aunt about the current risks to sponsors without status, as well as the fact that Aunt will be fingerprinted.

One particular type of advice – discouraging a person from talking to opposing counsel – has led to a wide variance of opinions. New York permits a lawyer to ask a witness not to provide information voluntarily to the other side in a civil matter;[50] District of Columbia and Virginia forbid a lawyer from even telling a witness he is not required to speak to opposing counsel;[51] and Maryland does not permit a lawyer to tell a third party what the client "prefers" regarding the party's contact with opposing party.[52]

The consequences for impermissible advice typically play out in relief from an agreement where one side was not represented.[53] In the immigration context, this is most likely to arise in the context of related legal issues, such as family court or criminal matters, where a lawyer may be interacting with an unrepresented third party whose actions bear directly on an aspect of the immigration representation.

Example: Lawyer represents Client seeking adjustment of status. Prior to the filing of the I-485, Lawyer learns that Client's Ex-Wife has gone to Family Court to seek an order of protection from Client for allegedly assaulting her and a suspension of Client's visitation with their child. Lawyer is aware of the highly negative impact the order of protection would have on Client's adjustment of status application. Lawyer meets with Ex-Wife, who is unrepresented, and drafts an agreement that allows supervised visitation for Client with child and withdraws the request for an order of protection.

Here, if Lawyer has violated 4.3 in his interactions with Ex-Wife, Ex-Wife could possibly rescind the agreement and pursue the order of protection. Client's application to adjust status would be imperiled by an order of protection.

In the context of business immigration petitions such as H-1B and I-140 petitions, there is often frequent interaction between the foreign national and the lawyer regarding maintenance of status issues, consular processing or obtaining H-1B extensions beyond the 6th year. Many immigration attorneys take the position that they are solely representing the employer in such petitions. If that is the case, what are the limits of their interactions with the foreign national employee? There is undoubtedly a potential for a conflict of interest.[54] The question then is whether the communications with the employee constitute legal advice. As noted *supra*, the Comments to Rule 4.3

[50] N.Y.C. BAR OP. 2009-5 (2009).
[51] D.C. ETHICS OP. 360 (2011); VA. ETHICS OP. 1795 (2004).
[52] MD. ETHICS OP. 2012-08 (2012).
[53] *E.g. Marino v. Usher*, 2014 WL 2116114, Civ. No. 11-6811 (E.D. Pa. 2014); *Hopkins v. Troutner*, *supra* n. 47. Rule 4.3 can also arise in the criminal context for *pro se* immigrant defendants. *See* VA. ETHICS OP. 1876 (2015) (prosecutor must advise *pro se* defendant to seek advice from immigration lawyer, or must ask court to conduct appropriate plea colloquy, prior to making plea offer that would subject defendant to deportation).
[54] For an example, *see* Hypothetical Two, *infra*. For a detailed discussion of whether a lawyer in this situation can represent both the employer and the employee, *see* Compendium Chapter 1.7.

apparently allow some discussion of legal obligations with an unrepresented adverse party. Where that discussion becomes "legal advice" is not clearly articulated, though the more "informational" and the less "advisory" the exchange, the more likely it will be deemed permissible.[55] For interactions that are more "advisory," a lawyer may be better off communicating with the employer's human resources department so they can interact with the employee, rather than risk over-stepping the line of permissible communications with an adverse unrepresented party.

C. State Rule Variations

Twenty-nine states have adopted MR 4.3 verbatim or have minor linguistic variations that do not change the meaning of the rule.[56] Twenty-one states and Washington D.C. have made modifications to MR 4.3. The two most common modifications involve the deletion of MR 4.3's guidance on providing legal advice to unrepresented clients,[57] and the addition of a provision on limited scope representation.[58]

Limitations on Giving Legal Advice to Unrepresented Persons

Alabama - Alabama does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[59]

Alaska - Alaska does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[60]

[55] *Compare Hanlin-Cooney v. Frederick Cnty.*, 2014 WL 576373, Civ. No. WDQ-13-1731 (N.D. Md. 2014) (statement by plaintiff's lawyer to defendant that defendant "would be covered by insurance" not impermissible legal advice); *with Hopkins v. Troutner*, 4 P.3d 557 (Idaho 2000) (upholding trial court determination that defense counsel's answer to unrepresented plaintiff's question "how much is this case worth" constitutes impermissible legal advice.) *See also* N.Y.C. BAR OP. 2009-2 (2009) (lawyer may provide unrepresented party with "incontrovertible" information about, *inter alia*, existence of legal rights).

[56] Arizona, Colorado, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, Washington, and West Virginia.

[57] Alabama, Alaska, Kansas, Maryland, Michigan, New Jersey, and Texas.

[58] Alabama, Alaska, Arkansas, Connecticut, Florida, Michigan, Montana, Rhode Island, Utah, and Wisconsin.

[59] **Alabama Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
(b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation. If such notice is provided, the person is considered to be unrepresented regarding matters not designated in the notice of limited-scope representation.

[60] **Alaska Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
(b) A person to whom limited-scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited-scope representation. If such notice is provided, the person is considered to be unrepresented regarding matters not designated in the notice of limited-scope representation.

Kansas - Kansas does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[61]

Maryland – Maryland does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[62]

Michigan - Michigan does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[63]

New Jersey – New Jersey does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[64]

Texas – Texas does not include the provision in MR 4.3 that forbids lawyers from "giving legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[65]

[61] **Kansas Rule 226:4.3**
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[62] **Maryland Rule 19-304.3**
An attorney, in dealing on behalf of a client with a person who is not represented by an attorney, shall not state or imply that the attorney is disinterested.
When the attorney knows or reasonably should know that the unrepresented person misunderstands the attorney's role in the matter, the attorney shall make reasonable efforts to correct the misunderstanding.

[63] **Michigan Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the self-represented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
(b) Clients receiving representation under a notice of limited appearance comporting with MCR 2.117(B)(2)(c) or other written communication advising of the limited scope representation are not self-represented persons for matters within the scope of the limited appearance, until a notice of termination of limited appearance representation comporting with MCR 2.117(B)(2)(c) is filed or other written communication terminating the limited scope representation is in effect. See Rule 4.2.

[64] **New Jersey RPC 4.3**
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

[65] **Texas Rule 4.03**

Limited Scope Representation Variation

Alabama - Alabama provides that a person being represented in a limited scope capacity is considered unrepresented for purposes of this rule, unless opposing counsel is provided with written notice of the limited scope representation. In that case, the person is considered unrepresented in matters not designated in the notice of limited scope representation.[66]

Alaska - Alaska provides that a person being represented in a limited scope capacity is considered unrepresented for purposes of this rule, unless opposing counsel is provided with written notice of the limited scope representation. In that case, the person is considered unrepresented in matters not designated in the notice of limited scope representation.[67]

Arkansas - Arkansas provides that a person being represented in a limited scope capacity is considered unrepresented for purposes of this rule, unless opposing counsel is provided with written notice of the limited scope representation. In that case, the person is considered unrepresented in matters not designated in the notice of limited scope representation.[68]

Connecticut - Connecticut adds the phrase, "in whole or in part" after the first line of MR 4.3, "In dealing on behalf of a person who is not represented by counsel," expanding the scope of the rule to include those who are represented by counsel in a limited capacity.[69]

Florida - Florida provides that an individual provided limited representation is considered unrepresented for the purposes of the rule unless opposing counsel knows or has been provided with a written notice of appearance

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[66] *See supra* n. 59.

[67] *See supra* n. 60.

[68] **Arkansas Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
(b) A person to whom limited scope representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for the purposes of this rule unless the opposing lawyer has been provided with a written notice of the limited scope representation. If such notice is provided, the person is considered to be unrepresented regarding matters not designated in the notice of limited scope representation.

[69] **Connecticut Rule 4.3**
In dealing on behalf of a client with a person who is not represented by counsel, in whole or in part, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

or written notice of time during which opposing counsel may communicate with the limited representation counsel as to matters within the scope of the limited representation.[70]

Michigan - Michigan provides that individuals receiving limited scope representation under MCR 2.117(B)(2)(c) are not considered unrepresented for matters within the scope of the limited representation until a notice of termination comporting with the above rule is filed or other written communication terminating the representation is in effect.[71]

Montana - Montana provides that an individual provided limited representation is considered unrepresented for the purposes of the rule, unless opposing counsel knows or has been provided with a written notice of appearance or written notice of time during which opposing counsel may communicate with the limited representation counsel as to matters within the scope of the limited representation.[72]

Rhode Island - Rhode Island provides that an individual provided limited representation is considered unrepresented for the purposes of the rule, unless engaged in a limited appearance (as statutorily defined) and opposing counsel has been served with notice of limited appearance or otherwise notified that the limited appearance has been filed. In this case, the unrepresented person is considered unrepresented only with regards to matters outside the scope of the limited appearance.[73]

[70] **Florida Rule 4-4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.
(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule Regulating The Florida Bar 4-1.2 is considered to be unrepresented for purposes of this rule unless the opposing lawyer knows of, or has been provided with, a written notice of appearance under which, or a written notice of time period during which, the opposing lawyer is to communicate with the limited representation lawyer as to the subject matter within the limited scope of the representation.

[71] *See supra* n. 63.

[72] **Montana Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
(b) An otherwise unrepresented person to whom limited representation is being provided or has been provided in accordance with Rule 1.2(c) is considered to be unrepresented for purposes of this Rule unless the opposing party or lawyer has been provided with a written notice of appearance under which, or a written notice of time period during which, he or she is to communicate only with the limited representation lawyer as to the subject matter within the limited scope of the representation.

[73] **Rhode Island Rule 4.3**
In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Utah - Utah provides that an individual provided limited representation is considered unrepresented for the purposes of the rule, unless the lawyer has provided written notice to opposing counsel outlining the limitations of the representation. In this case, the unrepresented client is considered represented only with regards to matters stated in the notice.[74]

Wisconsin - Wisconsin provides that an individual receiving limited scope representation (as statutorily defined) is unrepresented for purposes of this rule, unless the lawyer providing limited scope representation notifies the opposing lawyer of the limited scope representation.[75]

Other Variations

California - California adds a provision forbidding a lawyer from seeking to obtain privileged or other confidential information that the lawyer knows or reasonably should know could violate the person's duty to another, or otherwise be information the lawyer is not entitled to receive, from an unrepresented person.[76]

An otherwise unrepresented client for whom an Entry of Limited Appearance has been filed pursuant to Rule 1.2 is considered to be unrepresented for purposes of this Rule unless the opposing lawyer has been served with notice of the limited appearance, or the opposing lawyer is otherwise notified that an Entry of Limited Appearance has been filed or will be filed. In such instance, the otherwise unrepresented client is considered to be unrepresented only with regard to matters outside the scope of the limited appearance.

[74] **Utah Rules 4.3**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) A lawyer may consider a person, whose representation by counsel in a matter does not encompass all aspects of the matter, to be unrepresented for purposes of this Rule and Rule 4.2, unless that person's counsel has provided written notice to the lawyer of those aspects of the matter or the time limitation for which the person is represented. Only as to such aspects and time is the person considered to be represented by counsel.

[75] **Wisconsin SCR 20:4.3**

(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer's role in the matter.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

(b) An otherwise unrepresented party to whom limited scope representation is being provided or has been provided in accordance with SCR 20:1.2 (c) is considered to be unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer otherwise.

[76] **California Rule 4.3**

(a) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person incorrectly believes the lawyer is disinterested in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

If the lawyer knows or reasonably should know that the interests of the unrepresented person are in conflict with the interests of the client, the lawyer shall not give legal advice to that person, except that the lawyer may, but is not required to, advise the person to secure counsel.

Florida - Florida limits the legal advice a lawyer can give to an unrepresented person to advice to secure counsel.[77]

Kentucky - Kentucky limits the legal advice that a lawyer can give to an unrepresented person to advice to secure counsel.[78]

Maine - Maine permits a lawyer to provide legal information, though not legal advice, to an unrepresented individual, and permits a lawyer to negotiate with an unrepresented individual.[79]

Minnesota - Minnesota provides that, if a lawyer knows or reasonably should know that a client's interests are adverse to those of an unrepresented person, the lawyer must disclose to the unrepresented person that his/her client's interests are adverse to those of the unrepresented person.[80]

New Jersey - New Jersey requires a lawyer who represents an organization to determine, through reasonable diligence, whether or not they represent an individual person; if not, the lawyer is required to make this clear to the individual person.[81]

Oregon - Oregon calls for a lawyer to question his/her own interests (not simply his/her clients') when dealing with unrepresented persons.[82]

(b) In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not seek to obtain privileged or other confidential information the lawyer knows or reasonably should know the person may not reveal without violating a duty to another or which the lawyer is not otherwise entitled to receive.

[77] *See supra* n. 70.

[78] **Kentucky SCR 3.130(4.3)**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The lawyer shall not give legal advice to an unrepresented person. The lawyer may suggest that the unrepresented person secure counsel.

[79] **Maine Rule 4.3**

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

The lawyer shall not give legal advice to an unrepresented person, but may provide legal information to and may negotiate with the unrepresented person. The lawyer may recommend that such unrepresented client secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

[80] **Minnesota Rule 4.3**

In dealing on behalf of a client with a person who is not represented by counsel:

(a) a lawyer shall not state or imply that the lawyer is disinterested;

(b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;

(c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and

(d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

[81] *See supra* n. 64.

[82] **Oregon Rule 4.3**

In dealing on behalf of a client or the lawyer's own interests with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.

Virginia - Virginia prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure counsel, if conflicts between the person and the lawyer's client exist or could reasonably exist, regardless of the lawyer's knowledge of any conflicts.[83]

Washington D.C. – District of Columbia prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure counsel, if conflicts between the person and the lawyer's client exist or could reasonably exist, regardless of the lawyer's knowledge of any conflicts.[84]

Wisconsin - Wisconsin requires that a lawyer state his or her role in the matter to an unrepresented person, instead of only prohibiting a lawyer from stating or implying that the lawyer is disinterested.[85]

D. Hypotheticals

Hypothetical One: Helping a Client's Employee

Morgan is an immigration lawyer in private practice. She receives a phone call from an acquaintance, Tracy, who is employed as VP of Human Resources at Big Box Semiconductor, a large company in town. On the call, Tracy tells Morgan that she has heard rumors that Jacob, one of Big Box's employees, is in the United States without legal status and is working under a false name. This is particularly concerning as Jacob is a star employee and holds a management role. Tracy says that she wants Morgan to go to the headquarters office downtown in order to "get to the bottom of things." Morgan clears her schedule and hastily makes her way to Big Box's office. Upon Morgan's arrival, she is met by Tracy, who immediately ushers her into a room occupied by Jacob. Tracy greets Jacob cheerfully and tells him: "This is Morgan, our company's lawyer . . . she's here to help you sort some things out and has some questions for you." What should Morgan say?

Analysis

Assuming that Big Box is Morgan's client and that it is clear that Jacob is not in a position that requires involvement in dictating, or substantially consulting about, Morgan's representation, Morgan must make it clear

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client or the lawyer's own interests.

[83] **Virginia Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.
When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
(b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

[84] **Washington D.C. Rule 4.3**
(a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:
(1) Give advice to the unrepresented person other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of the lawyer's client; or
(2) State or imply to unrepresented persons whose interests are not in conflict with the interests of the lawyer's client that the lawyer is disinterested.
(b) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

[85] *See supra* n. 756.

whom she represents and her role in that representation, and may not offer Jacob any advice other than the advice to obtain a lawyer.

Who is Morgan's client? And what's the scope of representation, anyway?

Before saying anything, Morgan needs to confirm who her client is and what the scope of representation is. And she should reduce that agreement to writing. Under Rule 1.13, if Morgan is retained to represent Big Box, she will be representing the company "acting through its duly authorized constituents."[86] Morgan should confirm who will be the constituents through whom the organization's goals will be determined and with whom Morgan will be consulting about decisions.[87]

Assuming Big Box is the client, what should Morgan do to clarify her role?

Tracy's introduction of Morgan to Jacob – that Morgan is there "to help [Jacob] sort some things out…" – is extremely misleading. Morgan is there to protect Big Box's interests, including protecting them from possible criminal or civil liability for hiring an unauthorized worker or from continuing to allow Jacob to work at Big Box, knowing that he has committed fraud. Morgan knows, or reasonably should know, that Tracy's misleading statement will lead to Jacob misunderstanding her role. She should very explicitly clarify that she is there to protect Big Box's interests and that she is not, in fact, there to help Jacob.

So, can Morgan give Jacob any advice after clarifying her role?

Yes, but the only advice she can give is that he get a lawyer. There is no doubt that the interests of Big Box and Jacob are in conflict, or, at the very least, are very likely to be in conflict. Big Box's interests are almost certainly to disclose to law enforcement officials that Jacob has committed fraud. Those interests conflict with Jacob's interest in avoiding criminal prosecution, staying in his job, and staying in the U.S. Since the interests of Big Box and Jacob conflict, the only advice permitted by Rule 4.3 is that Jacob retain a lawyer. Note that nothing prohibits Morgan from asking Jacob questions; she just cannot give him advice beyond obtaining a lawyer and must ensure that her role has been clarified.

Hypothetical Two: An Unrepresented Party with Adverse Interests

Clarice is employed as an in-house immigration lawyer by Amazing Software, an IT services company. In that role, she provides immigration-related advice to Amazing Software executives and managers, and she prepares H-1B petitions, labor certification applications, and immigrant visa petitions that are filed by the company on behalf of the employees. One of those employees is Anthony. Anthony holds H-1B status that is due to expire soon, and he is the beneficiary of an approved immigrant visa petition filed by Amazing Software and prepared by Clarice. Anthony visits Clarice's office one day and tells Clarice that he is unhappy. "I can't stand my manager and I really think I'm being underpaid," he says to Clarice. "I heard that there's a way for me to join another company without losing my place in the green card line. I also heard that I'll be in an even better position after my adjustment of status application has been filed and been pending for six months. I'd like to know if that's all true and what I would need to do." Clarice knows that company management has been dissatisfied with Anthony's performance and has begun considering ways in which to terminate his employment. What should Clarice say?

[86] MR 1.13(a).
[87] MR 1.2(a).

Analysis[88]

There is no doubt that there is a conflict of interest here, so Clarice can give no advice to Anthony beyond the advice to obtain a lawyer. But what about simply continuing to talk? What if Clarice would like to get additional information, for example, so that she can advise Amazing Software about their unsatisfactory, disgruntled employee who is considering leaving his job? If Clarice wants to engage in an ongoing conversation with Anthony, she needs to clarify her role before doing so. It appears as though Anthony is under the impression that Clarice is there as his lawyer or, at the very least, to advise him. Clarice has an obligation under Rule 4.3 to make reasonable efforts to correct any misunderstanding about her role if she knows, or reasonably should know, that Anthony has such a misunderstanding. She should immediately explain to Anthony that her role is to protect the interests of Amazing Software and, if Anthony is seeking advice on his status or his employment, he should obtain his own lawyer. If, knowing Clarice's role, Anthony would like to continue the conversation, Clarice is permitted to do so, as long as she gives no advice beyond that. Given the adversarial dynamics at play, it would be wise for Clarice to have another lawyer or a paralegal in the room for the entire extended conversation.

Hypothetical Three: How Much Role Clarification is Enough?

Allison represents David in his removal hearing. David has a complicated cancellation of removal case and many relatives who want to testify. One relative who would like to testify is David's 16-year-old permanent resident daughter, Maria, who has suffered a rare, chronic, and debilitating illness throughout most of her life. Allison schedules an appointment to interview Maria about the hardship she would suffer if David were removed. During the course of the interview, Maria discloses to Allison that she is a drug user and she is considering becoming associated with a local gang and becoming a dealer. Allison tells Maria the immigration consequences of a drug offense, going so far as to advise Maria on what to do if she were arrested, including the possibility of deferred prosecution and first-time offender waivers. Allison implores Maria to get into counseling and then informs David of what Maria has told her. Maria becomes enraged and threatens to turn Allison into the state bar for revealing her secrets to David. Has Allison violated Rule 4.3?

Analysis

Allison clearly had good intentions in her interactions with Maria. Unfortunately, she has very likely violated Rule 4.3 both by failing to clarify her role with Maria at their meeting and by giving advice beyond the advice that Maria should obtain her own lawyer. Here, Allison needed to clarify her role to a younger, likely less-sophisticated person, who very likely would not understand Allison's role unless it were clearly explained to her. Allison should have explicitly told Maria that she is not her attorney, and what that means – that anything she tells Allison could get back to David or others, and that Allison's job is to protect David's interests, whether or not those are consistent with Maria's. In the end, by providing detailed legal advice to Maria, she did the opposite of clarifying her role; she set up a reasonable expectation that she was acting as an attorney for Maria.

In addition, the only permissible advice here is the advice to seek independent legal advice. David's interests are to have Maria testify to help establish his hardship case (though it is also plausible that his interest in protecting Maria would override his desire to have her testify). Maria's exposure to adverse immigration actions if her gang- and drug-related background were elicited, however, is great. Given the possible conflict of interest, Allison should

[88] The presumption in this case is that Clarice represents the employer only. For a detailed discussion of whether a lawyer in this situation can represent both the employer and the employee, *see* Compendium Chapter 1.7.

have advised Maria to seek independent legal counsel,[89] and may even be permitted to refer Maria to specific lawyers.[90]

Hypothetical Four: Client Permission to Interact with Unrepresented Party

Lila Pandulce has asked Alan Avocato to assist her in filing an application for asylum in the United States. Lila says she was an opposition activist in Venezuela, where she attended a series of five marches in Caracas. At the last march, she and her friend Celia Cruz were marching to the office of the Ombudsman where they planned to have a rally. As Celia and Lila marched through Caracas surrounded by other marchers, the riot police fired tear gas at them. Lila tells Alan that she and Celia were arrested by police. Lila says she was taken to a cell where the police interrogated her and severely beat her. The police demanded names of opposition activists and Lila says she broke down and gave them some names, and after several days was released. Lila tells Alan that she is afraid of the police because of her role in the opposition and she is afraid of the opposition because she had given the police names. Soon after Lila's release, she obtained a visitor's visa and was admitted to the U.S.

While Lila's asylum case is pending, Alan receives a call from Celia Cruz. Celia tells him that she arrived in the U.S. several months earlier from Venezuela and has filed an asylum application on her own. She says she would like to speak with Alan about being a witness for Lila and having Lila be a witness for her. She says she could be helpful to Lila by testifying, and vice versa. She makes clear to Alan that that she believes she does not need a lawyer and that she will be representing herself. What are the limits of Alan's interactions with Celia under Rule 4.3?

Analysis

As an initial matter, Alan should not even concede in the call with Celia that he represents Lila. Not only is that information confidential in a situation like this,[91] but Lila has asserted a fear of Venezuelan opposition activists. Celia has been an activist in the Venezuelan opposition and Alan has no idea what Celia's motivations might be. Prior to engaging in any conversation with Celia regarding his representation of Lila, Alan should consult with Lila both to ensure that she would like him to speak with Celia and to outline carefully what information about the representation he is permitted to reveal to Celia.

If Lila does grant permission to Alan to speak with Celia, then he must ensure Celia understands his role and that he provides no advice beyond the advice to secure counsel. In particular, Alan should be clear with Celia that he will only be proceeding with using Celia as a witness for Lila and advising Lila to be a witness for Celia if it serves Lila's interests, regardless of any impact on Celia's case. In addition, because Lila's particular claim of fear from the opposition party could negatively impact Celia's case, there is an obvious conflict of interest. Therefore, the only advice that Alan can provide to Celia is the advice to obtain counsel.

Hypothetical Five: What Constitutes "Legal Advice"?

Roger, a Swiss citizen, and his ex-wife Serena were represented by Simona in connection with their marriage-based I-130 and I-485 filing. Roger has recently obtained a final judgment for dissolution of marriage from Serena and needs to file a Form I-751 Petition to Remove Conditions on Residence. Roger retains Rafael, an immigration

[89] She also would have been ethically permitted under MR 1.4(b) (lawyer shall explain matter so client can make informed decisions), and 2.1 (lawyer may refer to non-legal considerations in providing candid, independent advice) to consult with David, as Maria's father, on how he wanted to handle Maria's drug and gang issues.
[90] *See* N.Y. CITY BAR OP. 2016-1 (2016) (even where prospective client has conflict of interest with a current client of lawyer, that lawyer may refer prospective client to another lawyer).
[91] *See* N.Y.S. BAR ASSOC. OP. 1088 (2016) (prohibiting disclosure of client's name or fact of representation where the disclosure is likely to be detrimental or embarrassing to the client).

lawyer not affiliated with Simona, to represent him in filing the form. After meeting with Roger, Rafael advises him to file the Form I-751 without Serena. Rafael also determines that there may be insufficient documentary evidence of his marriage to Serena to support the Form I-751. He considers mutual friends and family of Roger and Serena as potential witnesses to the marriage, but most of these individuals express reluctance to provide a statement. Rafael decides to interview Serena and take a statement from her.

Rafael calls Serena and introduces himself as Roger's immigration attorney. Rafael explains that he has been engaged to represent Roger in petitioning for removal of the conditions on Roger's status, and that he needs to obtain a declaration from her made under penalty of perjury to be successful on Roger's behalf. Serena tells Rafael that, prior to meeting Roger, she had been married to Juan Martin, who immigrated to the United States pursuant to Serena's sponsorship. They have remained business partners ever since, operating a tennis academy together in Boca Raton. Serena asks Rafael if the government will call her to discuss her declaration and whether the government will have questions about her former sponsorship of Juan Martin, now a U.S. citizen. Rafael answers that the government may require Serena to testify before an immigration officer in connection with Roger's I-751. Rafael further explains that the government can revisit past immigration filings to investigate possible fraud, including the I-130 petition Serena filed on behalf of Juan Martin. He tells her that if the government detected fraud in the old I-130, it could commence denaturalization proceedings against Juan Martin and he suggests that she review the I-130 closely to ensure that there are no inaccurate or fraudulent claims or entries.

Rafael proceeds to interview Serena and eventually sends her a proposed declaration to review and sign. In his email to Serena, Rafael asks Serena to make any changes to the declaration which may be necessary to make it true and complete. Rafael also advises Serena to call him if she has any questions about the significance of her declaration. Serena sends an email back thanking Rafael for his advice and support. Has Rafael violated Rule 4.3 through his interactions with Serena?

Analysis

By communicating with Serena on Roger's behalf concerning a transaction with significant implications for Roger's ability to preserve his resident status, Rafael has triggered the duties owed by a lawyer to a non-client under Rule 4.3. He may have violated the rule by providing Serena with legal advice.

Is Serena represented?

No. Although Serena was represented by Simona at the stage of petitioning for Roger's green card, there are no unresolved matters related to that case, and Roger has engaged Rafael to handle his Form I-751, which is a separate and distinct petition from the approved Form I-130.

Did Rafael state or imply that he is disinterested?

Rafael did not state that he was disinterested. Rafael has told Serena that he represents Roger and that he needs a declaration from her to advocate effectively for him. However, as a prudent lawyer, Rafael should have made it explicitly clear to Serena that he is not representing her or her interests with regard to Roger's Form I-751, especially after he was thanked by Serena for his "advice and support."

Did Serena misunderstand Rafael's role in regard to the Form I-751 and did Rafael then make reasonable efforts to correct the misunderstanding?

It seems likely that Serena did misunderstand Rafael's role, and he should therefore have explicitly corrected that misunderstanding. Rafael explained his relationship with Roger and the purpose of his representation. He explained the means he would employ to achieve Roger's objective, including interviewing Serena and preparing

her declaration, then filing it with the government in support of Roger's Form I-751. However, when Rafael received the email from Serena thanking him for his advice and support, he should have "reasonably known" that she perceived him as someone who was there to protect her interests. That misunderstanding should have been corrected.

Did Rafael know or reasonably should know that Serena's interests are or have a reasonable possibility of being in conflict with Roger's interests? If so, did Rafael give legal advice to Serena, other than advice to secure counsel?

Rafael should have known that Serena's interests have a reasonable possibility of being in conflict with Roger's interests. USCIS will consider Serena's testimony to determine whether Roger and Serena had a good faith intention to share their life together at the inception of their marriage. If USCIS finds that the marriage was entered into for immigration purposes, then it may be determined that Serena was culpable. Serena could be exposed to civil or criminal liability for her part in defrauding the government and be barred from filing future immigration petitions. To the extent Serena's declaration contradicts Roger's testimony, USCIS may deny Roger's Form I-751, terminate his conditional resident status, and initiate removal proceedings. Because of the reasonable possibility of conflict, the only permissible advice Rafael could have given to Serena would have been the advice to secure counsel.

Rafael's statements to Serena were legal advice beyond the advice to secure counsel. Therefore the statements were a violation of Rule 4.3 The comments to Rule 4.3 permit a lawyer to "prepare documents that require the person's signature and explain the lawyer's view of the meaning of the document or the lawyer's view of the underlying legal obligations." Here, Rafael advised Serena that she may be required to appear before an immigration officer in the capacity of a witness to give testimony regarding the contents of her declaration. He also discussed potential implications of submitting her declaration, including investigation of her previous I-130 petition and potential denaturalization proceedings against Juan Martin. Finally, he suggested that she review the I-130 closely to ensure that there were no inaccurate or fraudulent claims or entries. Taken together, these interactions constitute more than simply informing Serena of the underlying legal obligations undertaken when she signed the statement. They constitute advice on what actions Serena should take to protect herself.

Hypothetical Six: Advising a Third Party to Lie

World Tech proposes to sponsor Novak J. for permanent residence under the Outstanding Professors and Researchers category. Kei, World Tech's immigration lawyer, instructs Novak to send him the names and CVs of eight experts in Novak's field so he can draft support letters for World Tech's Form I-140 Immigrant Petition for Alien Worker. Upon receiving the experts' information from Novak, Kei drafts eight individual support letters and emails them to the experts. In the body of his emails Kei states, "I represent World Tech, the employer, and Novak J., the employee in connection with World Tech's proposed I-140 petition on behalf of Novak J. To be successful, we must demonstrate that Novak J. meets the criteria specified in 8 C.F.R. 204.5(i) for approval as an outstanding professor or researcher, which will allow him to apply to adjust his status to that of a lawful permanent resident ..."

Johnny Mac, a Computer Science professor and leading expert in the field of Machine Learning, replies to Kei. He expresses reluctance to sign the letter, referring to the statement that Novak J. "is recognized internationally as outstanding in the field of Machine Learning" as "completely over the top." Johnny Mac adds that he has never been asked to write a letter for immigration purposes before and that he has never had to hire a lawyer himself. Kei replies to Johnny Mac, summarizing the requirements for approval and stating that it will be very difficult for World Tech to succeed on its petition unless Johnny Mac's letter states that Novak J. is recognized internationally as outstanding in his academic field. Kei further tells Johnny Mac that a statement by Johnny that Novak J. "is recognized internationally as outstanding in the field of Machine Learning" would only represent Johnny Mac's professional opinion rather than a material fact. Upon receiving this assurance, Johnny Mac agrees to sign and return the letter. Has Kei committed an ethical violation through his interactions with Johnny Mac?

Analysis

Kei violated Rule 4.3 by giving advice to Johnny Mac, other than the advice to seek legal counsel. He also will have violated Rule 3.3 and possibly relevant fraud statutes if he submits the letter Johnny Mac signed to USCIS.

Is Johnny Mac represented?

Rule 4.3 applies here because Johnny Mac is a proposed witness regarding Novak J.'s abilities in the area of Machine Learning and is not represented by an attorney.

Did Kei state or imply that he is disinterested?

Kei informed Johnny Mac in his email that he represents World Tech and Novak J. He did not make any statement of disinterestedness. Nor did he imply that he is disinterested. In fact, Kei's email communication with Johnny Mac clearly indicated that he is the lawyer for World Tech and Novak J. regarding World Tech's I-140 petition. Kei also described the objective of the I-140 petition as being to secure lawful permanent resident status for Novak J.

Did Kei sufficiently explain his role to Johnny Mac in regard to the Form I-140?

Yes. Kei explained his role as World Tech and Novak J.'s lawyer with regard to filing the I-140 petition and Johnny Mac expressed no misunderstanding about what Kei's role would be. Kei could have explicitly stated that he is not Johnny Mac's lawyer to ensure there was no misunderstanding, but that was not ethically required in this situation because there was no reason that Kei should have "reasonably known" that Johnny Mac misunderstood Kei's role.

Did Kei give legal advice to Johnny Mac, other than advice to secure counsel? If so, did Kei know or should he reasonably have known that World Tech or Novak J.'s interests are or have a reasonable possibility of being in conflict with Johnny Mac's interests?

Kei advised Johnny Mac that his support letter is merely an opinion and not a material fact, downplaying the fact that the statement is false. This legal opinion creates two ethical problems. First, Kei has violated Rule 4.3 by providing advice, other than the advice to seek counsel, to a person whose interests could be in conflict with his client's interests. Novak J. and World Tech – Kei's clients – have a clear interest in a strong support letter from Johnny Mac; Johnny Mac, on the other hand, has an interest in avoiding any legal or professional adverse consequences that could come from submitting a false statement. The only advice Kei could have given to Johnny Mac with regard to his statement, therefore, was the advice to seek counsel. Instead, his communications with Johnny Mac that the letter was only an opinion implied that it did not have to be accurate. Of course, the line between what is permissible "legal information" and impermissible "legal advice" is clear. Ultimately, it may be a decision based upon the applicable state's rule and binding ethics opinions, and the amount of risk the lawyer is willing to take.

The second, and perhaps even greater, problem involves the submission of evidence that Kei knows is false. As the preparer of the Form I-140, Kei has a duty not to offer false or misleading evidence to USCIS, even if the expert expresses he is willing to sign the letter.[92] If Kei submits a letter of support that he knows is misleading at best, and an outright lie at worst, he will have violated Rule 3.3, and possibly a variety of anti-fraud statutes as well, depending on the jurisdiction. Kei could avoid the 3.3 problem by asking Johnny Mac what he could truthfully say in his support letter.

[92] *See* Compendium Chapter 3.3 for a detailed discussion on whether USCIS is a tribunal for purposes of Rule 3.3.

Hypothetical Seven: Information vs. Advice

Jane, who is a U.S. citizen, and her husband Rafael hire Charles to serve as their lawyer in pursuing Rafael's marriage-based application for permanent residence. Jane is a graduate student with no income. After Jane pays his retainer, Charles explains to both clients that there is an affidavit of support requirement for Rafael's application. As the petitioner, Jane must file the affidavit of support. She needs to provide evidence that she earns enough to meet the minimum income threshold. If her income is insufficient, the couple needs to find a joint sponsor who independently meets that income threshold and the joint sponsor needs to complete a separate I-864.

After Jane and Rafael talk with Jane's mother, she agrees to serve as joint sponsor, but she has a few questions about how to complete the I-864 form and the extent of her obligations to Rafael in different scenarios. Jane and Rafael want Charles to answer these questions. Instead, Charles sends Jane's mother a written explanation of the affidavit of support obligations with a copy of the I-864 form and a list of supporting items needed. Charles sends a cover letter that he does not represent Jane's mother, but that he will check the completed form and let his clients know if any additional information is needed.

Has Charles violated Rule 4.3 through his interactions with Jane's mother?

Analysis

Charles has not violated Rule 4.3. The commentary to Rule 4.3 explicitly provides that contact with unrepresented persons that involves preparing documents for signature, explaining a document's meaning, and even the underlying legal obligations that come with the document, are permissible. At least on its face, that is the type of contact that occurs between Charles and Jane's mother.

However, given that Jane's mother said she had questions for Charles, Charles should be alert to the possibility that she misunderstands his role and thinks he is there to assist and advise her beyond what is necessary to accomplish the goals of his client. So although he said in his cover letter he does not represent Jane's mother, to be certain there is no misunderstanding, he could also include a sentence explaining that his role is to assist Jane and Rafael and to protect their interests. This would also serve the purpose of clarifying that he is not "disinterested" in the matter.

Advising Jane's mother on the extent of her obligations in different scenarios would not be permitted. There is a reasonable possibility of conflict of interests here, so Charles must be careful to ensure that his answers to the questions cannot be deemed advice, beyond the advice to retain a lawyer. Jane's mother is legally binding herself to the support obligation, which creates a benefit for Jane and Rafael, but a burden for her. Of course, Jane's mother is very possibly happy to take on that burden, but Charles is not in a position where he can give her independent, candid advice if she asks for any guidance on whether it is a good idea for her own financial planning purposes to take on this obligation. Therefore, though he can *explain* what the affidavit means and what legal obligations it creates in response to any questions Jane's mother has, he cannot *advise* her on what actions to take.[93] The only advice he can give her is the advice to get a lawyer.

Hypothetical Eight: Contact with Constituents and Employees of a Corporate Client

Charles is an immigration lawyer who regularly talks with Santiago, the HR Director of Midwest Meat, Inc., on cases involving temporary work visa applications, employment-based permanent residence, and on questions related to Form I-9 Employment Eligibility Verification. Charles advised Santiago, as Midwest Meat's HR Director, during and after the company's internal I-9 audit. In response to this earlier internal audit, and the many errors

[93] *See supra* n. 41 et seq. and accompanying text for a discussion on the line between "advice" and "information".

discovered, the company hired an outside consultant to conduct a workshop for the company's HR specialists on completing I-9 forms. After this training, the company's HR specialists realized that they had made mistakes on many of their I-9 forms. Acting on their own initiative to fix their mistakes, the HR specialists made corrections to previously completed I-9 forms by using "white out" and typing over incorrectly completed boxes with corrected information. They also started more closely scrutinizing I-9 forms for new hires with accents or those who appeared to be foreign, requiring specific additional documents to verify their identity and work authorization. They did this as a precaution to help the company avoid hiring unauthorized workers. ICE has just initiated an I-9 inspection of Midwest Meat, Inc. and the company has retained Charles to provide representation.

Because of the risk of criminal exposure from the worksite enforcement action, should Charles inform corporate HR or Midwest Meat employees when he is communicating with them about the case that he is not representing their personal interests?

Should Charles remind these corporate employees that they do not need to talk with him and that they can hire their own lawyer?

Analysis

The first issue Charles needs to sort out is who the client is. Assuming that the client is the company, Midwest Meat, Inc., then Charles needs to clarify with them who the "constituents" are at the company who are directing the representation and whether he is also being retained to represent the HR directors and specialists. These questions are crucial to determining whether his communications with the employees falls under client communication rules, such as Rules 1.4 and 2.1, or Rule 4.3 guidance on communicating with unrepresented persons.[94]

If Charles is retained to represent Midwest Meat, Inc., as directed by individuals other than anyone from the HR department, he will have to be extremely circumspect in his interactions with the HR director and specialists. There is no doubt that there are conflicting interests here, as the company's best course of action could involve terminating the employment of the HR employees, or even alerting ICE or other authorities to their actions in order to limit the company's exposure to criminal or civil liability. Charles can therefore speak with the employees, but only if he makes it clear that he is not disinterested, and that his role is to protect the interests of Midwest Meat, Inc., and not the HR employees' individual interests.

Rule 4.3 does not require that Charles inform the employees that they do not need to speak with him and that they can hire their own lawyer. Due to the conflicting interests of the company and the employees, the only advice Charles is permitted to give them is to obtain a lawyer; he is not, however, *required* to give that advice. Should he give that advice? Morally, of course he should; ethically, it is not mandated under Rule 4.3.[95]

[94] There are also conflict of interest issues arising under MR 1.7 and 1.13 that would have to be addressed if Charles is being retained to represent the company and its employees.

[95] Charles should be careful not to run afoul of other rules in his communications with the employees, whether or not he chooses not to advise the employees to obtain independent counsel, including MR 4.1(a) (lawyer shall not make a false statement of material fact or law to third person), MR 8.4(c) (lawyer shall not engage in conduct involving, *inter alia*, deceit or dishonesty), and MR 8.4(d) (lawyer shall not engage in conduct prejudicial to administration of justice).

E. Chart of Variations by State

State Name	Categorization of Variation
Alabama	Omits Guidance on Providing Legal Advice Alabama does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals. Includes Provision on Limited Scope Representation Alabama provides that a person being represented in a limited scope capacity is considered unrepresented for purposes of this rule, unless opposing counsel is provided with written notice of the limited scope representation. In that case, the person is considered unrepresented in matters not designated in the notice of limited scope representation.
Alaska	Omits Guidance on Providing Legal Advice Alaska does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals. Includes Provision on Limited Scope Representation Alaska provides that a person being represented in a limited scope capacity is considered unrepresented for purposes of this rule, unless opposing counsel is provided with written notice of the limited scope representation. In that case, the person is considered unrepresented in matters not designated in the notice of limited scope representation.
Arkansas	Includes Provision on Limited Scope Representation Arkansas provides that a person being represented in a limited scope capacity is considered unrepresented for purposes of this rule, unless opposing counsel is provided with written notice of the limited scope representation. In that case, the person is considered unrepresented in matters not designated in the notice of limited scope representation.
California	Impermissible to Seek Confidential or Privileged Information California adds a provision forbidding a lawyer from seeking to obtain privileged or other confidential information that the lawyer knows or reasonably should know could violate the person's duty to another, or otherwise be information the lawyer is not entitled to receive, from an unrepresented person.
Connecticut	Includes Provision on Limited Scope Representation Connecticut adds the phrase, "in whole or in part" after the first line of MR 4.3, "In dealing on behalf of a person who is not represented by counsel," expanding the scope of the rule to cover communications with those who are represented by counsel in a limited capacity.
District of Columbia	Removes Knowledge Requirement for Legal Advice Prohibition District of Columbia prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure counsel, if there are or could reasonably exist conflicts between the person and the lawyer's client, regardless of the lawyer's knowledge of any conflicts.
Florida	Includes Provision on Limited Scope Representation Florida provides that an individual provided limited representation is considered unrepresented for the purposes of the rule unless opposing counsel knows or has been provided with a written notice of appearance or written notice of time during which opposing counsel may

State Name	Categorization of Variation
	communicate with the limited representation counsel as to matters within the scope of the limited representation. Permissible Advice Limited to Securing Counsel Florida limits the legal advice that a lawyer can give to an unrepresented person to advice to secure counsel, even where there is no conflict of interest or reasonable possibility of a conflict.
Kansas	Omits Guidance on Providing Legal Advice Kansas does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals.
Kentucky	Permissible Advice Limited to Securing Counsel Kentucky limits the legal advice that a lawyer can give to an unrepresented person to advice to secure counsel, even where there is no conflict of interest or reasonable possibility of a conflict.
Maine	Distinguishes Legal Advice from Legal Information Maine permits a lawyer to provide legal information, though not legal advice, to an unrepresented individual, and permits a lawyer to negotiate with an unrepresented individual.
Maryland	Omits Guidance on Providing Legal Advice Maryland does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals.
Michigan	Omits Guidance on Providing Legal Advice Michigan does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals. Includes Provision on Limited Scope Representation Michigan provides that individuals receiving limited scope representation are not considered unrepresented for matters that fall under the scope of limited representation until a notice of termination is filed or another written communication terminating the representation is in effect.
Minnesota	Higher Standard for Disclosure of Adverse Interests Minnesota provides that if a lawyer knows or reasonably should know that a client's interests are adverse to those of an unrepresented person, the lawyer must disclose that their client's interests are adverse to those of the unrepresented person.
Montana	Includes Provision on Limited Scope Representation Montana provides that an individual provided limited representation is considered unrepresented for the purposes of the rule unless opposing counsel knows or has been provided with a written notice of appearance or written notice of time during which opposing counsel may communicate with the limited representation counsel as to matters within the scope of the limited representation.

State Name	Categorization of Variation
New Jersey	Omits Guidance on Providing Legal Advice New Jersey does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals. Application to Constituents of a Represented Organization New Jersey requires a lawyer who represents an organization to determine, through reasonable diligence, whether or not an individual person is also represented by the organization's attorney. If not, the lawyer is required to make this clear to the individual person.
Oregon	Dealing on Behalf of Lawyer's Own Interests Oregon calls for a lawyer to question his/her own interests (not simply their clients') when dealing with unrepresented persons.
Rhode Island	Includes Provision on Limited Scope Representation Rhode Island provides that an individual provided limited representation is considered unrepresented for the purposes of the rule unless engaged in a limited appearance (as statutorily defined) and opposing counsel has been served with notice of limited appearance or otherwise notified that the limited appearance has been filed. In this case, the unrepresented person is considered unrepresented only with regards to matters outside the scope of the limited appearance.
Texas	Omits Guidance on Providing Legal Advice Texas does not include the provision in MR 4.3 that addresses lawyers giving legal advice to unrepresented individuals.
Utah	Includes Provision on Limited Scope Representation Utah provides that an individual provided limited representation is considered unrepresented for the purposes of the rule unless the lawyer has provided written notice to opposing counsel outlining the limitations of the representation. In this case, the unrepresented client is only considered represented in the matters stated in the notice.
Virginia	Removes Knowledge Requirement for Legal Advice Prohibition Virginia prohibits a lawyer from giving advice to an unrepresented person, other than the advice to secure counsel, if conflicts between the person and the lawyer's client exist or could reasonably exist, regardless of the lawyer's knowledge of such conflicts.

State Name	Categorization of Variation
Wisconsin	Includes Provision on Limited Scope Representation Wisconsin provides that an individual receiving limited scope representation (as statutorily defined) is unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer of the limited scope representation. Higher Standard for Informing Person of Lawyer's Role Wisconsin requires that a lawyer state his or her role in the matter to an unrepresented person, instead of only prohibiting a lawyer from stating or implying that the lawyer is disinterested.

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This chapter of the AILA Ethics Compendium is written by Theo Liebmann, and produced and published by the 2018-19 AILA National Ethics Committee and the AILA Practice & Professionalism Center.

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State Name	Categorization of Variation
Wisconsin	Includes Provision on Limited Scope Representation Wisconsin provides that an individual receiving limited scope representation (as statutorily defined) is unrepresented for purposes of this rule unless the lawyer providing limited scope representation notifies the opposing lawyer of the limited scope representation. Higher Standard for Informing Person of Lawyer's Role Wisconsin requires that a lawyer state his or her role in the matter to an unrepresented person, instead of only prohibiting a lawyer from stating or implying that the lawyer is disinterested.

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American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 5.3
Responsibilities Regarding Nonlawyers

Sherry K. Cohen, Reporter

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MODEL RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER

Introduction

Immigration lawyers, like others, know they must comply with the rules of professional responsibility not only because compliance leads to better representation, but also because the failure to comply may expose a lawyer to professional discipline and malpractice suits, not to mention other civil liability and loss of clients. As discussed in previous Ethics Compendium chapters, lawyers are required to maintain client confidences, avoid conflicts of interest, act with candor toward a tribunal, provide competent and diligent representation and safeguard funds or property belonging to clients or third parties, among other obligations. However, even lawyers who personally abide by their professional ethical obligations may find themselves subject to a disciplinary investigation based on the conduct of a non-lawyer employed by or associated with the lawyer.

For immigration lawyers, who routinely delegate work to non-lawyers employed under their supervision because of the volume of cases handled and the need to communicate with non-English speaking clients, the analysis of Rule 5.3 raises questions of particular importance to their daily practice. May a trusted receptionist fielding a call from an impatient client asking about their marriage-based residency application provide information about the status of a case or advice in the course of explaining a document? May an experienced paralegal who assists an immigration lawyer in preparing USCIS forms routinely sign the lawyer's name to the document in order to meet a filing deadline? May a nonlawyer employee of a company engaged by a lawyer to provide electronic case status tracking disclose confidential client information to which he has had access? Even well-meaning and well trained nonlawyers may make decisions that are contrary to the professional obligations of the lawyers they support. Should the lawyer be subject to discipline in such cases? Under Model Rule (MR) 5.3, he might depending on the circumstances.[1]

MR 5.3 imposes obligations on lawyers to take steps to ensure that nonlawyer conduct is compatible with the professional rules that apply to lawyers. MR 5.3(a) applies to managers and partners of a law firm who have the authority to implement policies and practices to guard against the possibility that nonlawyers will engage in conduct that would violate the rules of conduct applicable to lawyers. MR 5.3(b) imposes analogous obligations on lawyers who directly supervise nonlawyers. The obligations imposed on those with managerial authority and those who directly supervise nonlawyers involve preventative measures. As long as those lawyers provide adequate supervision, assume responsibility, and take steps to ensure that nonlawyers do not engage in conduct that would violate a professional conduct rule—even if the nonlawyer engaged in misconduct despite those measures—the lawyers will have complied with MR 5.3(a) or (b).

MR 5.3(c) identifies two circumstances under which a lawyer, with managerial or supervisory authority, will be held responsible for nonlawyer misconduct even when proper precautionary measures have been implemented under MR 5.3(b). Under MR 5.3(c)(1) any lawyer will be held responsible for a nonlawyer's misconduct if the lawyer orders the misconduct or ratifies it. Under MR 5.3(c)(2) a partner or law firm manager will be held responsible for a nonlawyer's misconduct if the lawyer learns of the misconduct at a time when he can take steps to prevent it from occurring or to mitigate the consequences of the misconduct. Essentially, under MR 5.3(c) knowledge in some form of the wrongdoing triggers responsibility. Presumably, a lawyer who orders or ratifies the conduct has knowledge of the

[1] Lawyers should always check the applicable state's version of the Model Rules. *See* Summary of State variations from MR 5.3, In addition, lawyers should check the state's version of MR 8.5 concerning choice of law principles.

misconduct. While the plain language of MR 5.3(c) does not include a "constructive knowledge" or a "should have known" alternative to actual knowledge, a partner or manager may not escape liability under MR 5.3(c) where there was evidence that the lawyer consciously avoided knowledge of the wrongdoing. In such cases, the lawyer may be found to have violated MR 5.3(a) or MR 5.3(b) as well.

Since most immigration lawyers use the services of nonlawyers for firm related matters, they must be familiar with MR 5.3. Lawyers who practice immigration law should be particularly mindful of the obligations and responsibilities under MR 5.3, since immigration lawyers rely on nonlawyers to handle many tasks, including acting as interpreters, performing intake, maintaining case calendars, assisting in the preparation and filing of immigration forms, gathering required supporting documents, and functioning as the immigration lawyer's contact person with the client, particularly when the lawyer is not proficient in the client's language, has a volume practice or is frequently away from the office for hearings.[2]

There are other professional conduct rules that concern a lawyer's obligation to ensure ethical conduct that may overlap with the requirements of MR 5.3. For example, in addition to the requirement under MR 1.6(a) to maintain client confidences except as provided otherwise under MR 1.6(b), under MR 1.6(c), a lawyer is required to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[3] That broadly worded provision would obviously include appropriate supervision of nonlawyers who have access to confidential information."[4] MR 8.4(a) may also overlap with MR 5.3 in that it prohibits a lawyer from violating or attempting "to violate the Rules of Professional Conduct, knowingly assist or

[2] An actual ad posted on a local Craigslist website for an immigration paralegal demonstrates the tasks nonlawyer paralegals may be asked to perform, as follows:

Client related matters:

• Screen incoming client calls

• Meet with/communicate with clients in a professional and courteous manner to gather documents,

• Draft immigration forms, exhibit lists, and client statements for attorney review

• Translate letters and other short documents.

• Draft letters to companies, institutions, and government agencies to assist the client in obtaining police, court, medical, school and other records

• Occasional research such as about country conditions and some legal research

• Track case progress, send updates to clients; update case status in case management software

Administrative matters:

• Data input into case management, billing, calendaring, and accounting software as needed and

• Scanning, shredding, filing, answering phones.

• Assist attorney with billing and accounting as needed

Marketing matters:

• Assist attorney with firm newsletter, social networking

• May assist attorney with research or writing blog posts

See also duties of paralegals set forth in Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2014-15 Edition, Paralegals and Legal Assistants, on the Internet at *http://www.bls.gov/ooh/legal/paralegals-and-legal-assistants.htm* (visited March 17, 2015).

[3] *See* MR 1.6(c).

[4] As in the case of MR (a) and (b), as long as the lawyer makes reasonable efforts to prevent a breach of confidentiality under MR 1.6(c), the lawyer will not be held responsible for any breach that may have occur. *See, e.g., Utah State Bar v. Jardine*, No. 20100600 (October 2, 2012)(although the lawyer engaged in numerous violations of professional conduct warranting suspension, she cannot be held responsible for her secretary's inadvertent disclosure of confidential information when she included another client's file in papers sent to a former client's lawyer; while a lawyer may have responsibility under Rule 5.3 for the conduct of a nonlawyer employee, no such responsibility can be assigned to the lawyer under Rule 1.6).

induce another to do so, or do so through the acts of another."[5] Clearly, any lawyer who directed a nonlawyer to engage in what would amount to professional misconduct if committed by a lawyer (or ratified it) in violation of MR 5.3(c)(1) would be in violation of MR 8.4(a) as well.[6] MR 1.4, which requires adequate communication between the lawyer and client about matters relevant to the representation, may be relevant to MR 5.3 in that the obligations imposed under MR 1.4 appear to be those that may need to be performed by a lawyer and, depending on the circumstances may be delegable to a nonlawyer.[7] Immigration lawyers should also be aware of the procedures under which a nonlawyer for an "accredited" nonprofit agency may be authorized to act as legal representative for foreign nationals and the interplay under MR 5.3 between lawyers associated with those agencies and the nonlawyers.[8]

Although the wording of MR 5.3 is straightforward, compliance with its obligations may be very challenging to immigration lawyers who frequently rely on the services of nonlawyers. The day-to-day practice of immigration law may trigger questions such as those listed below:

May an immigration lawyer authorize her nonlawyer legal assistant to conduct intake from a prospective immigration client?

May an immigration lawyer permit his legal assistant to recommend the best avenue of relief to obtain permanent residency a prospective immigration client?

May an immigration lawyer who has already interviewed a client in the presence of his legal assistant delegate the complete responsibility of preparing the statement of facts for an asylum application? Is the lawyer required to review the statement prior to its submission to the USCIS?

Would an immigration lawyer hiring a legal assistant with ten years of experience at a reputable immigration law firm be required to provide training concerning compliance with the rules of professional responsibility applicable to lawyers?

Is it a requirement under MR 5.3 that a lawyer generate an office manual for nonlawyer staff?

Under what circumstances would an immigration lawyer be held ethically liable for aiding the unauthorized practice of law by her legal assistant who maintained a small independent immigration practice to assist indigent foreign nationals achieve permanent residency?

Would an immigration lawyer who uses a highly regarded American law firm located in China satisfy the supervisory requirements under MR 5.3 as to nonlawyer misconduct by obtaining oral assurance from the managing partner that the firm makes every effort to provide proper supervision of their nonlawyer support staff?

Would an immigration lawyer be held responsible under MR 5.3 for his legal assistant's one-time failure to timely file an H-1B application?

May an immigration lawyer authorize his nonlawyer bookkeeper to prepare and sign checks for filing fees held in the lawyer's escrow account?

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[5] *See* MR 8.4.

[6] *New York City Bar Formal Ethics Op.* 2010-2 [advising that a lawyer's use of an investigator to gain access to a litigation party's otherwise secure social networking website through false representations would violate both Rule 5.3(c) and Rule 8.4(c)].

[7] We include a more detailed discussion of the interplay between MR 5.3(b) and MR 1.4 below.

[8] *See, e.g.*, BIA RECOGNITION AND ACCREDITATION: A Step-by-Step Guide for Non- Profit Community-Based Agencies, Catholic Immigration Network, Inc. *http://mcc.org/sites/mcc.org/files/media/common/documents/biaworldreliefandclinicbiaguideoct2014.pdf*.

To what degree, under MR 5.3, are all partners in a large immigration firm obligated to engage in adequate supervision of nonlawyers?

We begin by discussing the key terms used in MR 5.3, to be followed by annotations and commentary on each sub-section of the rule, including citations to ethics opinions and disciplinary decisions. [To review the full text of MR 5.3 and the comments, please visit the Model Rules of Professional Conduct: Table of Contents on the American Bar Association's website.] We will address special concerns of immigration lawyers, namely, unauthorized practice of law [UPL] by nonlawyer employees or individuals associated with a firm, interactions with foreign lawyers and nonlawyers, employment of suspended or disbarred lawyers; and issues of confidentiality and adequate communication. In addition, because some state's supervision rules vary from MR 5.3, we will provide a summary of state variations. Lastly, we will provide and discuss various immigration law hypotheticals involving the application of MR 5.3.

Prudent and conscientious lawyers should always carefully review the applicable state versions of MR 5.3, as well as the applicable state versions of any model rule cited in this chapter.

A. Text of Rule

ABA Rule 5.3—Responsibilities Regarding Nonlawyer

To review the full text of MR 5.3 and the comments, please visit the *Model Rules of Professional Conduct: Table of Contents* on the American Bar Association's website.

B. Key Terms and Phrases

Firm or Law Firm

MR 5.3 applies to lawyers in a "law firm." The terms "firm" or "law firm," which are defined broadly under MR 1.0(c), includes every type of legal work environment, specifically

> a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

As discussed in the Summary of State Variations, some states like New York and New Hampshire, explicitly provide that discipline may be imposed on a law firm, in addition to any lawyer, whose conduct violates a professional conduct rule.[9]

Partner

MR 5.3(a) and (c)(2) apply expressly to a partner in a law firm, which is defined under MR 1.0(g) as "a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law."

Managerial Authority

In addition to partners, MR 5.3(a) and (c)(2) apply expressly to lawyers with "comparable managerial authority [to partners] in a law firm." Although the phrase is not defined in the model rules,

[9] *See, e.g.*, New York N.Y.C.C.R §603.2(b) which provides that: "Any *law firm* that fails to conduct itself in conformity with the Rules of Professional Conduct (22 N.Y.C.R.R Part 1200) ……. shall be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law"[Emphasis added; Wilens and Baker, 9 AD3d 213] May 20, 2004 (law firm, along with named partner, received a public censure for among other things, engaging in a pattern of rude and uncivil conduct directed at immigration clients); N.J Rules of Professional Conduct Rule 5.3(a)(extending the obligation to properly supervise nonlawyer to "every lawyer, *law firm or organization*, authorized by the Court Rules to practice law in this jurisdiction" [Emphasis added].

the everyday understanding of the word "manager" should suffice. A lawyer with "managerial authority" has the power to control or direct the affairs of the law firm or a part thereof.[10]

Supervisor

MR 5.3(b) imposes obligations on lawyers who are not necessarily partners or managers in a law firm, but nevertheless have "direct supervisory authority" over the nonlawyer. Although the phrase "direct supervisory authority" is not defined in the Model Rules, the everyday understanding of "direct supervisor" should suffice. In a law firm, a supervisor might be a senior associate working under the supervision of a partner who supervises a junior associate.

Knowingly, Known, or Knows

Under MR 1.0(f), the terms "knowledge" and "knows" are defined as "actual knowledge of the fact in question" which may be "inferred from circumstances." Under MR 5.3(c), a lawyer is only responsible for a nonlawyer's violation of MR 5.3 if she knows of the misconduct. This makes sense since unlike MR 5.3(a) and (b), MR 5.3(c) applies only when there has been nonlawyer misconduct and the lawyer was actually made aware of it. Where a nonlawyer is able to conceal the misconduct, the lawyer should not and would not be liable under MR 5.3(c). As discussed, a lawyer may be deemed to have knowledge if he is found to have engaged in conscious avoidance of knowledge of the non-lawyer's misconduct.

Reasonable or Reasonably

Under MR 5.3(a) and (b), the affirmative duty imposed on lawyers to make efforts to ensure that nonlawyers comply with the rules of professional conduct is limited to those measures that are "reasonable." Under MR 1.0, the term reasonable is described as "the conduct of a reasonably prudent and competent lawyer"—in other words, the reasonable lawyer standard. The key to complying with MR 5.3 turns on what is deemed reasonable under the circumstances. For example, it would likely be reasonable to permit experienced and well-trained nonlawyers, who have been advised about what constitutes the unauthorized practice of law, to gather information from immigration clients to assist the lawyer in determining the remedies available to the client where the lawyer meets regularly with the nonlawyer to review the nonlawyer's caseload and meets with the client as well. Such procedures would provide reasonable assurance that the nonlawyer's conduct conforms to the rules of professional conduct. Lawyers and law firms that allow nonlawyers to interact with clients without any supervision or prepare work that is not reviewed by a lawyer would almost certainly be found to have violated MR 5.3. See discussion at pp. --- for more detailed discussion of reasonable measures.

C. Annotations and Commentary

Who Are These "Nonlawyers"?

MR 5.3, imposes obligations and responsibilities on lawyers with respect to "nonlawyers employed or retained by or associated with a lawyer " irrespective of their title.

MR 5.3 applies to any nonlawyer who provides "assistance" to a lawyer in connection with specific clients or firm related matters—whether or not he has the title of "assistant." The term nonlawyer is construed very broadly. The Comments to MR 5.3 make clear that the nonlawyers covered by the rule may be salaried full or part time employees or independent contractors within or outside the firm. A

[10] A manager is a person "who has control or direction of an institution, business, etc., or of a part, division, or phase of it." Online Etymology Dictionary. Retrieved February 20, 2015, from Dictionary.com website: *http://dictionary.reference.com/browse/manager*

nonlawyer's status as an "independent contractor" might have collateral benefits for a law firm or the individual, but such status has no bearing on the lawyer's responsibility under MR 5.3.

Nonlawyer employees or independent contractors within the firm may include secretaries, investigators, law student interns, computer technology specialists and paraprofessionals, sometimes called "legal assistants," "legal administrators" or "paralegals."[11] Nonlawyers could also include lawyers from another state, or foreign jurisdiction who have not yet been admitted in the state where they may be currently employed and suspended or disbarred lawyers. MR 5.3 also applies to nonlawyers outside the firm such as individuals or companies who provide internet based-services, document preparation, research or any other work related to case or law firm matters performing such services on a contract basis (otherwise referred to as "outsourcing").[12] MR 5.3 may apply to a nonlawyer employee who communicates in a foreign language with a client,[13] a volunteer non-lawyer "community advocate" who makes direct contact with community members by distributing flyers door to door,[14] a nonlawyer in charge of lawyer's election campaign for judicial office,[15] nonlawyer investigators hired to interview unrepresented persons,[16] and a nonlawyer client who offers to assist the lawyer with his matter.[17]

MR 5.3(a)

MR 5.3(a) provides that a law firm partner and other lawyers "who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." [Emphasis added]

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[11] *See* Comment 2 to MR 5.3. *Note: The terms "legal assistant," "legal administrator," or "paralegal" will be used interchangeably in this report.*

[12] *See* Comment 3 to MR 5.3. *See In re Flack*, 33 P.3d 1281 (Kan. 2001)(lawyer responsible for misconduct committed by nonlawyer representatives of estate planning company engaged to solicit clients, prepare documents and provide legal services); Ill. Ethics Op. 03-07(2004)(lawyer responsible for misconduct of interpreter hired to communicate with hearing-impaired client); In re Shepard, 169 Wash. App. 697 (May 6, 2010)(T & E lawyer found to have violated Rule 5.3(a), among others, as to nonlawyer "living trust" salesman, not employed or paid by lawyer, but who gave the lawyer's contact information and fee agreement to elderly customers through door-to-door sales of the trust product, where lawyer has reason to know that salesman was providing limited legal advice and failed to establish precautionary measures to ensure that nonlawyer did not engage in misconduct); *ABA Formal Op.* 95-398 (October 27, 1995)(under MR 5.3, lawyer retaining outside computer maintenance company must institute procedures to ensure that company has procedures to protect confidentiality of information and fully understands lawyer's ethical obligations, which might include obtaining written statement of the company's assurance of confidentiality); *Indiana Bar Assoc. Ethics Op.* 3 of 2000 (lawyer may utilize the services of a paralegal who is not a full or part-time employee of the lawyer, but employed by outside paralegal service firm as long as lawyer abides by Rule 5.3 and Indiana Guidelines 9.1 through 9.10 regarding "Use of Legal Assistants").

[13] *Ala. Ethics Op.* 2008-1 (2008) (using a nonlawyer employee to communicate with a client imposes duty on lawyer under Rule 5.3 to ensure that nonlawyer accurately communicates client information to the lawyer and accurately relays the lawyer's communications to the client).

[14] *See Phila. Bar. Op.* 2012-1 (August 2012)(nonprofit legal service provider may ethically use nonlawyer volunteer community advocates to reach out to community members on a one to one basis for the purpose of informing them generally about the organization and to particular community members that may be in need of legal services as long as the organization takes steps under Rule 5.3 to ensure that nonlawyers comply with Rules 7.1 (communications concerning a lawyer's service), 7.2 (advertising) and 7.3 (direct contact with prospective clients).

[15] *In re Anonymous*, Docket No. 129 D.B. 90, 1992 LEXIS 603 (1992)(lawyer running for judgeship responsible for misrepresentations or misleading statements in advertisements placed by nonlawyer campaign manager who had described ethical rules for lawyers as "silly").

[16] Wash. D.C. Ethics Op. 321(July 2003) (lawyer for a party will not run afoul of supervisory obligation under Rule 5.3(b) by directing investigator to seek an interview with pro se party if lawyer makes reasonable efforts to ensure that the investigator complies with Rule 4.3, *i.e.*, investigator must not mislead pro se party about investigator's role and if it appears that pro se party misunderstands his role, investigator must take whatever affirmative steps are necessary to correct the misunderstanding.); *see* Joan C. Rogers, Scandals Involving Investigators Ensnare Lawyers, 22 Law. Man. On Prof. Conduct 507.

[17] *In re Cline*, 756 So.2d 284 (La. 2000)(lawyer found to have violated Rule 5.3(b) by failing to supervise client who offered to assist lawyer in completing settlement of his case but unbeknownst to lawyer, forged signature of previously retained lawyer on settlement checks because he did not want to pay him).

What Makes a Partner Or Other Lawyer A "Manager"?

The duty under MR 5.3(a) applies to partners or those with comparable managerial authority. In the day-to-day practice of law, there may be an overlap between the roles of a managing partner, a partner-in-charge or any supervising lawyer with respect to nonlawyers who work on a case or firm matters. MR 5.3(a) speaks exclusively to lawyers who have the authority to set the policies and practices of the law firm or other legal services entity.[18] Comment 1 to MR 5.1, which imposes parallel obligations and responsibilities on partners, managers and supervisors with respect to lawyers in a law firm, describes those with managerial authority as "members of a partnership, the shareholders in a law firm organized as a professional corporation and [other lawyers] having comparable managerial authority."[19] Lawyers who have such authority would violate MR 5.3(a) by failing to establish firm wide policies and procedures designed to ensure that nonlawyers comply with the rules of professional conduct applicable to lawyers. MR 5.3(a) not only applies to lawyers bearing the title of managing partner or partner in charge, but also to lawyers with the title of director of a non-profit legal services provider, chief counsel of a corporation or legal department or a managing lawyer of a governmental law department, such as a city corporate counsel office. Because MR 5.3(a) and MR 5.3(b), discussed below, focus only on a lawyer's obligations to take precautionary measures, actual nonlawyer misconduct is not an element of either MR 5.3(a) or MR 5.3(b). As a practical matter, however, a lawyer's failure to properly supervise a nonlawyer would not likely come to light if there were no actual nonlawyer misconduct.[20]

What Is Reasonable?

"Reasonable" efforts to provide "reasonable" assurance of proper conduct by non-lawyers.

Under MR 5.3(a) partners and managers of a law firm have an obligation – note the use of the verb "shall" --- to put in place "reasonable" precautionary measures that provide "reasonable" assurance that nonlawyers who work on firm matters do so in a way that is compatible with the ethical obligations imposed on lawyers under professional conduct rules.

As discussed below, under MR 5.3(b) other lawyers are required to take similar measures, but the duty is triggered by the lawyer having "direct supervisory" authority. In other words, the supervising lawyer is basically charged with the responsibility of following through the policies and procedures set by the managing lawyers under MR 5.3(a). In solo or small firm practices the two functions may merge. For that reason and others, many of the authorities cited in the discussion of MR 5.3(b), supra, have a bearing on our discussion of MR 5.3(a) and vice versa. A lawyer who is able to demonstrate that she has taken steps to reasonably ensure that a nonlawyer complies with professional conduct rules will have satisfied the obligations imposed under both MR 5.3(a) or (b).

At a minimum, reasonable precautionary measures should include taking steps to advise the nonlawyers of the ethical obligations imposed on lawyers under MR 5.3. Reasonable measures would also include setting up protocols for the nonlawyer to follow depending on the nature of the matter and the

[18] *See* ABA, A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2005, at 566,577 (2006)(amendment meant to clarify that Rule 5.3 applies "to managing lawyers in corporate and governmental legal departments and legal services organizations, as well as to partners in private law firms.").

[19] *See* Comment 1 to MR 5.1.

[20] *Matter of Miller*, 872 P.2d 661 (1994)(where lawyer permitted nonlawyer to run firm's collection lawyer resulting in nonlawyer's conversion of client funds, court opined that a lawyer who supervises a nonlawyer assistant is not required to guarantee that assistant will never engage in professional misconduct, but when, as in the instant case, the supervising lawyer took no precautionary steps whatsoever, Rule 5.3(b)[or (a)] is violated, regardless of whether or not the nonlawyer engages in misconduct, citing G. Hazard, Jr. and W. Hodes in *The Law of Lawyering: The Handbook on the Model Rules of Professional Conduct*, p. 464 (1989).

level and experience of the nonlawyer.[21] For nonlawyers working within the firm, reasonable measures would include having a written job description of the nonlawyer's position and articulated office procedures preferably in writing, as in an office manual. A manual should include specific guidelines as to the various ethical rules to be observed, in particular reminders about maintaining the confidentiality of client information; not giving unsupervised legal advice in conversations with clients and being sure to make clear that they are not lawyers in communications with the public. In addition, the lawyer should have in place, and preferably in writing, supervision guidelines where applicable requiring that a lawyer review, approve, and personally sign all pleadings and legal documents. A lawyer also should have in place procedures for training nonlawyers who will be handling client funds or property, which should include provisions for the lawyer to retain tight control over client funds as set forth in MR 1.15.[22]

The existence of appropriate policies and procedures, even when set forth in a manual, still may not be sufficient to provide reasonable assurance of nonlawyer compliance with the rules, if the overall environment of the law firm is one that values the ends more than the means. For example, a law firm may have written policies and procedures concerning intake and retention of clients for nonlawyer legal administrators who conduct the initial client intake and present clients with a blank retainer agreement. Those policies and procedures may stress the importance of providing accurate information about the services which the law firm may provide before the client meets with the lawyer. However, if the same law firm provides bonuses to the legal administrators based in part on client retention, the law firm may be providing the legal administrators with a motive to use pressure tactics, puffery, or misrepresentation.[23]

MR 5.3(b)

MR 5.3(b) provides that "a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer." [Emphasis added].

What Makes A Lawyer A "Supervisor"?

The duty applies to all lawyers with direct supervisory authority over the nonlawyer.

Whereas MR 5.3(a) imposes broad obligations on managers and partners of law firms, MR 5.3(b) imposes somewhat more pointed obligations on lawyers, whether they are managers, partners or associates, who directly supervise nonlawyers working on firm matters. The duty imposed on supervisory lawyers involves much more than passive reliance on systems put in place by managers or

[21] *See* Comment 2 to MR 5.3 ("measures employed in supervising nonlawyers [within firm] should take account of the fact that they do not have legal training and are not subject to professional discipline."); Comment 3 to MR 5.3(measures employed in supervising nonlawyers outside the firm "will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.")

[22] *See* MR 1.15 and Carole J. Buckner, IOLTAs and Client Trust Accounts *available at* http://www.americanbar.org/publications/gp_solo/2011/july_august/ioltas_client_trust_accounts.html.

[23] *See, e.g., In re Phillips*, 244 P.3d 549 (Ariz. 2010)(managing and founding lawyer of high volume bankruptcy, criminal defense and personal injury firm who used "legal administrators" to conduct intake was found to have violated Rule 5.3(a) despite policies prohibiting use of pressure tactics where bonuses paid to legal administrators based on client retention figures, provided a motive to disregard policies; court found that the "words in the firm's policy manual prohibiting such conduct were insufficient to insulate managers and supervisors from ethical responsibility when the actual ongoing practices were to the contrary."); *but see* Philadelphia Bar Ass'n Prof. Guidance Comm., Op. 2001-7 (law firm may pay nonlawyer employee a bonus if bonus is not tied to fees generated from a particular case or class of cases from a specific client).

partners.[24] In particular, mere reliance on the nonlawyer's word that his work satisfied ethical requirements is not sufficient to satisfy MR 5.3(b).[25] As a practical matter, a supervising lawyer would need to review documentation requiring the lawyer's or client's signature. The supervising lawyer should also be sensitive to any other observable factors that might suggest the nonlawyer is not acting in compliance with the precautionary measures put into place by partners or managers.

The clearest example of a lawyer's failure to properly supervise nonlawyer employees occurs when a lawyer essentially fails to review the nonlawyer's work on client matters,[26] or even work pertaining to the law firm generally, such as the firm's website.[27] A lawyer's failure to supervise nonlawyer assistants may help create an office environment that encourages her nonlawyer assistants to cut corners or even engage in dishonest conduct.[28]

Although not necessarily a widespread practice, some lawyers employ nonlawyer family members or close friends as legal assistants or to perform other office related functions. Those lawyers must be careful to preserve the same level of objectivity in supervision as they would with any other nonlawyer employee. In particular, lawyers may find it more difficult to adequately supervise or impose office disciplinary measures on a nonlawyer family member whose substantive work is subpar or ability to comply with ethical standards imposed on lawyers has been called into question. Even worse, a lawyer

[24] *See .e.g., In re Bright*, 171 B.R. 799 (E.D. Mich. 1994)(in action brought by trustee against independent nonlawyer bankrupty service provider used by lawyer, court found that "the lawyer is not adequately supervising the non-lawyer if the lawyer does not know about the existence or content of the meetings between the non-lawyer and the debtor); Michigan Formal Ethics Opinion R-1 (December 16, 1988)(lawyer in charge of nonprofit legal services program cannot "adequately supervise the quality of legal services rendered by six civilian and eighteen prison paralegals to a prospective client population of 4,500 prisoners located in prisons throughout the State of Michigan); Michigan Guidelines for the Utilization of Legal Assistant Services, Guideline 2 and Comment (if lawyer relies solely on nonlawyer as intermediary, neglecting to meet directly with the client or if the lawyer fails to use his independent professional judgment to determine which documents prepared by the non-lawyer should be communicated outside the law office, lawyer not providing adequate supervision under Rule 5.3).

[25] *So. Carolina Ethics Op.* 09-0 (2009)(under Rule 5.3(b) in real estate matter, a supervising lawyer "may not rely solely on a non-lawyer's representations that the conduct of a transaction is ethically proper").

[26] *Matter of Galbasini*, 163 Ariz. 120 (1990)(lawyer who entered into agreement with nonlawyer debt collection agency in which he had a financial interest and permitted agency to maintain separate off premise location which bore his name violated MR 5.3(b) by failing to provide any meaningful supervision; rare visitations to office with no interaction with agency's employees; no review of demand letters on his letterhead which were signed with his initials as counsel without his knowledge; no review of use of engagement letters used by nonlawyers to solicit business; lawyer's argument that Rule 5.3 does not impose "vicarious liability" while correct is not relevant since the basis for liability under Rule 5.3 is lack of reasonable supervision; court found that "respondent conducted no supervision, reasonable or otherwise."); *People v. Calvert*, 280 P.3d 1269, 1283(lawyer's claimed ignorance of paralegal's unauthorized actions not relevant to lawyer's violation of Rule 5.3(b) for failing to properly supervise where lawyer failed to engage in "basis oversight" of her work and to use "simple diligence").

[27] *See, e.g., In re Foster*, 45 So.3d 1026 (La. 2010) (All five members of the management committee of a Louisiana firm publicly reprimanded for the failure to properly supervise a nonlawyer employee who had responsibility for the firm's website that suggested or implied that a former Louisiana governor was a member of the firm, a governmental relations specialist and a partner of the firm, when in fact he had never been a licensed Louisiana attorney).

[28] *See Mahoning County Bar Ass'n v. Lavelle* (Ohio 2005)(where lawyer had failed to file marriage dissolution papers, his inadequately supervised secretary falsely advised client that the case was pending and that a hearing would be scheduled; in another matter same secretary altered documents by using white-out to change dates of client's signature; court found that lawyer's conduct violated standards under MR 5.3(b) when he "chose to remain oblivious to the improper actions of the persons he hired."); *In re Roberts*, 397 SC 559 (SC 2012)(lawyer failed to properly supervise nonlawyer who emailed client a purported copy of a demand letter in a collection action lawyer was handling for client when in fact no such letter was ever sent and nonlawyer generated the letter months after date shown); *In re Sanclemente*, Case No. 2011-0234-B (Del. Nov. 23, 2104)(lawyer formerly employed by a loan settlement company, established law office employing former nonlawyer staff of company; lawyer relied solely on trust and left office management to nonlawyer staff who falsified HUD-1 statements as part of scheme with client, failed to take steps to ensure nonlawyer compliance with rules and deemed to have ratified misconduct in spite of alleged concerns).

who not unreasonably believes that family members are always the most trustworthy may find such trust betrayed.[29]

What constitutes reasonable measures under MR 5.3(b) (and as discussed under MR 5.3(a) as well) will depend on the circumstances. Reasonable internal procedures are by definition not an exact science, but at a minimum a lawyer with managerial authority should use common sense. This would include establishing and implementing procedures for proper instruction, training and ongoing oversight regarding the substantive work to be performed as well as instruction and training about the ethical aspects of their employment, such as:

providing diligent representation (MR 1.3),[30]

maintaining client confidences (MR 1.6),[31]

avoiding conflicts of interest (MR 1.7 and 1.8),[32]

avoiding contact with represented parties (MR 4.3),[33]

avoiding the unauthorized practice of law (MR 5.5),[34] or

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[29] *See* Barbara Glesner Fines, Ethical Issues in Family Representations, Carolina Academy Press, p. 69 (2010)(reminding lawyers not to allow personal relationships with nonlawyer assistants to interfere with supervision of those assistants); See also cases numerous involving misappropriation of funds or fraud on clients such as *In re Finestrauss*, 32 A.3d 978 (Del. 2011)(lawyer failed to supervise bookkeeper-wife, who failed to pay various payroll obligations); *In re Otlowski*, 976 A.2d 172 (Del. 20090(lawyer's employee daughter misappropriated funds from his escrow account); *In re Galasso*, 94 A.D.3d 30(2d Dept. 2012)(lawyer's bookkeeper brother misappropriated funds from escrow account); *In re Vanderbeek*, 101 P.3d 88 (Wash. 2004) (lawyer's bookkeeper husband habitually added unearned charges to client bills where lawyer did not even minimally review bills).

[30] *People v. Smith*, 74 P3d 566 (Co. 2003) (solo practitioner lawyer had measures in place to reasonably assure that all communications with his office were promptly brought to his attention and nonlawyer assistant would conduct herself in such a manner compatible with professional conduct rules, but nonlawyer did not follow procedures and lawyer failed to supervise nonlawyer in violation of Rule 5.3(b) by failing to review her work or simply review the client file).

[31] Comment 2 to Model Rule 5.3 advises that nonlawyers within firm must be given "appropriate instruction and supervision" regarding obligation of confidentiality; *see, e.g., New York City Bar Formal Ethics Op.* 1995-11 (July 6, 1995)(noting lawyer's obligation to ensure that nonlawyers maintain client confidences, observed that "transient nature of lay personnel is cause for heightened attention to breach of confidentiality issues); *Colo. Ethics Op.* 119 (2008)(supervising lawyer has duty to make reasonable efforts to ensure firm has "appropriate technology and systems in place so that subordinate lawyers and nonlawyer assistants can control transmission of metadata").

[32] *See, e.g., Miss. Bar Ethcis Op.* 258 (2011) (law firm must establish procedures to identify potential conflict of interest of nonlawyer, who may have worked on same matter another law firm, and ensure that actual conflict does not occur by having screening and appropriate training procedures in place under MR 5.3)**;** *ABA Informal Ethics Op.* 88-1526 (1988) (discussing potential for imputed disqualification arising from nonlawyer's change in employment from one firm to the other, lawyers have a duty to make reasonable efforts to ensure that nonlawyers do not disclose information relating to the representation of clients while in the lawyer's employ and afterward"); *Owens v. First Family Financial Services*, 379 F. Supp 840 (S.D. Miss. 2005)(once firm was on notice that paralegal working on firm's client as plaintiff had worked on cases for the defendants at prior firm, lawyers had duty under Rule 5.3(b) to undertake reasonable measures, such as screening to ensure that firm was not conflicted; since they did not, motion to disqualify granted); [add *Penn. Bar Op*. 88-127 when we get it]; *La. Ethics Op.* 1832 (May 10, 2007)(in order to avoid conflicts of interest between prospective and retained client, nonlawyer support staff should be trained to minimize information obtained from prospective clients; viable screening of nonlawyer secretary who received confidential information from wife concerning divorce may prevent disqualification of firm retained to represent husband in the divorce matter).

[33] *In re Environmental Ins. Declaratory Judgement Actions*, 252 N.J. Super. 510, 660 AD2d165 (1991)(standard for lawyers hiring investigators to interview former employees of policy holders is Rule 5.3(b) which requires supervisory lawyer to take reasonable steps to ensure that investigator's conduct conformed with professional responsibility rules, in particular training nonlawyers regarding contact with unrepresented non-party witness such as former employees and ex parte contact with those represented by counsel).

[34] *In re Pinkins*, 213 B.R. 818 (Bankr. E.D. Mich. 1997)(lawyer's fees disallowed where trustee found that nonlawyers employed by high volume bankruptcy law firm engaged in unauthorized practice of law by meeting directly with clients without lawyer supervision, exercising legal judgment by deciding what questions to bring to lawyer, providing legal advice by explaining legal concepts to the client, such as difference between Ch. 7 and Ch. 13 and assisting client in decision making; court opined that it was not relevant that legal assistants were well trained in substantive Bankruptcy law in finding unauthorized practice and lawyer's failure to supervise).

proper handling of client property and funds (MR 1.15).[35]

Most importantly, managerial and supervisory lawyers should view the obligations imposed under MR 5.3(a) and (b) as those that must be tailored to the particular circumstances of the law practice. This would include taking into consideration the ratio of lawyer supervisors to nonlawyers, the level of experience and skill of the nonlawyers, the nature of the work to be performed and volume of cases. Ongoing actions should include frequent assessment of the measures employed to ensure nonlawyer compliance with the rules of professional responsibility under MR 5.3.

For more detailed discussions concerning unauthorized practice of law and MR 5.3 see pp -------. For more detailed discussions concerning duty of confidentiality and MR. 5.3 see pp.

MR 5.3(c)

MR 5.3(c) provides that "a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

When Is A Lawyer Ethically Responsible For Misconduct Of A Nonlawyer?

MR 5.3 imposes responsibility on lawyers for the misconduct of nonlawyers, but it is not vicarious liability, which arises solely from relationship itself.[36] Under MR 5.3(c) responsibility is premised on the conduct of the lawyer in the context of the nonlawyer misconduct. Even with diligent training and appropriate supervision, nonlawyers may make mistakes or for reasons of their own engage in intentional misconduct. Under MR 5.3(c), a lawyer would be held responsible for the conduct of the

[35] *In re Bailey*, 821 A.2d 851 (Sup. Ct. Del. 2003)(managing partner of law firm has "enhanced duties" over lawyers and nonlawyer employees of firm to comply with escrow account obligations which include appropriate supervisory measures designed to insure compliance by firm's bookkeeper with professional rules of responsibility); *In re Galasso*, 94 A.D.3d 30(2d Dept. 2012) (lawyer held responsible for misconduct of his nonlawyer brother who served as bookkeeper and stole millions from the firm's accounts, lawyer failed to take basic precautionary measures such as personal review of bank statements, personal contact with the bank and improved oversight of firm's books and records which would have mitigated the losses; found to have violated Rule 5.3(b)); *Matter of Fadner*, 299 Wis. 2d 54 (2007)(lawyer who failed to review billing statements prepared by nonlawyer, which were falsified, violated 5.3(b) and 5.3(c)(1); *Matter of Nowak*, 5 A.3d 631 (2010)(lawyer held responsible for numerous escrow account violations where he entrusted nonlawyers, with little or no experience, to manage his accounts; failed to review reconciliation reports and failed to provide guidance to nonlawyers who came to him with problems); *In re Ponder*, 375 S.C. 525 (S.C. 2007)(health problems did not excuse lawyer's failure under Rule 5.3 to supervise nonlawyer entrusted to handle escrow account who embezzled client funds where lawyer failed to review cancelled checks); *In re Stoddard*, 391 SC 447 (S.C 2011(lawyer failed to properly supervise nonlawyer who handled trust account by authorizing nonlawyer to sign his name to disbursement checks and failing to review monthly bank statements) *Atty Grievance Coomm. Maryland v. Zuckerman*,403 Md. 695 (2008)(where head of firm failed to have appropriate measures in place to guard against nonlawyer embezzlement of funds in firm escrow account; reasonable efforts would have included instruction as to proper management of trust account and procedures for oversight of records maintained by nonlawyer, including actual review of cancelled checks); *In re Cater*, 887 A. 2d 1 (D.C.2005)(in connection with duties as conservator over two estates, lawyer violated MR 5.3(b) by turning over responsibilities for handling trust accounts to secretary who over a nine-month period forged lawyer's signature on checks drawn embezzling over $42,000 and never reviewing monthly bank records and also by delegating preparation of annual accountings filed with court without reviewing primary-source financial documents.)

[36] G. Hazard, Jr. and W. Hodes in *The Law of Lawyering: The Handbook on the Model Rules of Professional Conduct,* §44.2. at 44-3 (making clear that Rule 5.3 "establishes an independent duty of supervision rather than a regime of imputed liability"); *see* Law Dictionary: What is "vicarious liability?" definition of "vicarious liability" (Black's Law Dictionary) (Vicarious liability or vicarious responsibility is an "obligation rising from a parties relationship with each other.")

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nonlawyer only on the basis that the lawyer had some level of knowledge of the misconduct and failed to take timely action to avoid or mitigate it.

MR 5.3(c)(1) applies to lawyers, regardless of whether they have managerial or supervisory authority, who have ordered the nonlawyer to engage in the misconduct or ratified it through non-action. The line between a direct order to engage in misconduct and ratification of the misconduct may be a fine one, but for purposes of liability under MR 5.3(c)(1) ratification is presumed if the lawyer had knowledge of the misconduct and took no action to the contrary. As in most cases, knowledge of the misconduct may be inferred by the circumstances.[37]

MR 5.3(c)(2) holds lawyers with managerial or direct supervisory authority responsible for the misconduct of a nonlawyer if they learn of the misconduct and fail to take "reasonable remedial action" when there is an opportunity to do so. If the lawyer never learns of the misconduct in the first place, he will not be held responsible under MR 5.3(c)(2). However, as in the case of many rules that have a knowledge component, a lawyer who is found to have engaged in conscious avoidance of facts—in essence, when the lawyer does not want to know—may be deemed to have knowledge within the meaning of the rule.[38]

Special Areas of Concern

Aiding Unauthorized Practice of Law: When Does a Nonlawyer Cross the Line?

Once of the most common consequences of failing to properly supervise nonlawyer assistants is the risk that they will engage in conduct deemed the unauthorized practice of law. This may occur, for example, if the nonlawyer provides legal advice that reflects his own judgment, such as recommending a particular remedy for the client to pursue, without being adequately supervised by a lawyer. In the immigration context, a nonlawyer might provide such advice during an intake screening of a prospective client or when working directly with the client without any level of supervision. Another example of unauthorized practice of law by a paralegal occurs when the paralegal gives the appearance, intentionally or unintentionally, that he is a practicing lawyer by not identifying himself as a nonlawyer. Non-profit legal services providers must be particularly careful about this potential problem.[39]

The degree of supervision of nonlawyers will vary depending on the skills and experience of the nonlawyer, and the likelihood that ethical problems may arise when working on the matter. Hence, a law graduate who has passed the bar and is about to get admitted, and who has already acquired hands-on immigration experience in law school clinics or internships, may need a different level of supervision than one who has just graduated with a bachelor's degree in a field not related to law. For immigration lawyers, determining the level of supervision for highly experienced and responsible paralegals may be

[37] *See, e.g., In re Allen*, 198 W.Va 18 (1996)(lawyer deemed to have ratified in-person client solicitation by nonlawyer employees, where shortly after the solicitation, lawyer signed letters to potential clients which included firm materials and made specific reference to the nonlawyers who had contacted them); *Matter of McMillan III*, 359 SC 52 (2004) (lawyer deemed to have ratified nonlawyer handling of loan closings, at which nonlawyer signed his name to HUD-1, even though lawyer never specifically authorized anyone else to sign name on documents; court reasoned that lawyer had knowledge of false signatures, in some instances and constructive knowledge that practice ongoing when respondent was unable to be present at closings and by not prohibiting such conduct.); *Florida Bar v. Flowers*, 672 So. 2d 526 (Fla. 1996)(lawyer permitted nonlawyer "immigration consultant" to lease space in his office suite leading unsuspecting prospective clients who met with the nonlawyer to believe they were represented by the lawyer, even though they paid fees directly to immigration consultant; lawyer violated Rule 5.3(c) by ratifying the misconduct of a nonlawyer associated with him.)

[38] New York's Rule 5.3 expressly articulates a "should have known" standard. *See* Summary of State Variation.

[39] Immigration firms which rely heavily on paralegals to interact with clients also should take care to make sure that clients do not perceive law assistants or paralegals assigned to their cases as their "lawyers."

more challenging.[40] For example, many experienced immigration paralegals, especially those who handle only one type of immigration matter, may be as qualified to provide legal advice concerning that type of matter as a lawyer. During the course of working with the client, the client may ask that paralegal for advice about a collateral legal issue with which the paralegal is familiar. Many immigration lawyers may choose to authorize their paralegals to answer such questions based on their assessment of the paralegal's competence and integrity, but they must always bear in mind the obligations set forth in MR 5.3. Under MR 5.3(a) or (b), a lawyer is obligated to implement and enforce measures designed to prevent nonlawyers from engaging in activities associated with practicing law without supervision from the lawyer. Under MR 5.3(c), a lawyer would be held responsible for the nonlawyer's unauthorized practice by in effect ratifying or failing to take measures to avoid or mitigate such conduct by nonlawyers.

In addition, a lawyer who permits a nonlawyer to provide legal advice or otherwise engage in conduct that could amount to the practice of law, when performed without the appropriate level of supervision, may be found to violate MR 5.5(a) which prohibits a lawyer from practicing law in a jurisdiction in which he is not admitted in violation of the rules of that jurisdiction or *assisting* another in doing so.

For these reasons, the prudent and conscientious immigration lawyer should consider in the scenarios discussed below setting ground rules for the client and any nonlawyer employed by or associated with the lawyer that make clear that the nonlawyer is not authorized to practice law in the relevant jurisdiction, that the nonlawyer is performing under the supervision of the lawyer and that the lawyer has the ultimate responsibility for the legal services provided the client.

Overseas Lawyers, Nonlawyer Intermediaries, and Nonlawyer Paralegals

A lawyer may decide to use the services of a foreign lawyer not admitted in the U.S. or nonlawyer working outside the U.S. to provide US-based legal or related services in their home country on behalf of the client. While there is no prohibition against using the services of foreign lawyers or nonlawyers in their employ or other nonlawyers out of the country, adequate supervision of such nonlawyers presents special challenges which require the lawyer to approach any arrangement with lawyers and nonlawyers providing services in other countries with heightened caution.[41] In particular, the lawyer should, among other things, conduct background checks, obtain resumes, and conduct telephonic or in person interviews, where possible, before deciding to use the nonlawyer's services. The lawyer also must take steps to ensure that the nonlawyers understand and are capable of complying with the rules against the unauthorized practice of law by nonlawyers (here, either nonlawyers that are supervised by foreign lawyers or independent nonlawyers who are not admitted to practice law in the jurisdiction in which the

[40] Some guidance as what amounts to adequate supervision for nonlawyers may be found in New York's version of Rule 5.3(a) which provides that "the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter." *Lawyers should check their home state's version of Rule 5.3 for guidance as to the required level of supervision.*

[41] 2007 *North Carolina Formal Ethics Op.* 12 (April 25, 2008)(since the same obligations and responsibilities concerning supervision under MR 5.3 apply to foreign nonlawyers (and foreign lawyers), if physical separation, language barriers, differences in time zones or inadequate communication channels do not allow a reasonable and adequate level of supervision to be maintained over the foreign nonlawyer's work , the lawyer should not retain the foreign nonlawyer to provide services); (*Florida Bar Ethics Op.* 07-02 (January 18, 2008)(lawyer may ethically outsource work to foreign lawyer, assisted by paralegals, which work includes transcription of dictation tapes, document preparation, creation of business entities and immigration forms and letters, but must recognize the difficulties inherent in supervising individuals in another country, in particular, in avoiding conflicts of interest and breaches of confidentiality).

services are being performed) in accordance with the obligations and responsibilities under MR 5.3. Best practice would be to obtain assurances from the nonlawyers in writing.[42]

Suspended or Disbarred Lawyers

The prohibitions against unauthorized practice of law under MR 5.5 and the obligations and responsibilities imposed under MR 5.3 also apply to suspended or disbarred lawyers.[43] Any lawyer considering employing, retaining or associating with a suspended or disbarred lawyer, should exercise extreme caution. In particular, the lawyer should be aware of regulations, case law and ethics opinions in their home jurisdiction on such practices, which may vary from state to state. Some states, such as Rhode Island, explicitly prohibit employment of suspended or disbarred lawyers as legal assistants.[44] Others, such as California, expressly permit employment of suspended or disbarred lawyers as legal

[42] Although two of the leading ethics opinions concerning outsourcing of legal services in foreign countries that limit the suggestion that lawyers obtain written contractual assurances from foreign nonlawyers as to maintaining client confidences and avoiding conflicts of interests, obtaining similar contractual assurances concerning the unauthorized practice of law in their own jurisdiction makes sense as well. *See, e.g., New York City Bar Ethics Op.* 2006-3 (proper supervison of foreign nonlawyer, including lawyer admitted in a foreign jurisdiction, would include obtaining background information of any intermediary involved, resume of nonlawyer; conducting reference checks, advance telephonic interviews with nonlawyer and regular communication with the nonlawyer concerning the assignment; measures to ensure that nonlawyers maintain client confidences would include restricting access to nonrelevant confidences and obtaining contractual assurance of compliance with confidentiality rules and remedies in the event of breach; measures to ensure there are no conflicts of interest would include asking the intermediary and nonlawyers providing services to perform conflict check; and to obtain advance client consent to the outsourcing.); *ABA Formal Ethics Op.* 08-451 (minimizing risk of improper disclosure may include obtaining written confidentiality agreement).

[43] *See North Dakota Bar Op.* 01-02 (advising that suspended lawyer may act as a legal assistant as long as the suspended lawyer complies with seminal case, *In re Application of Christianson*, 215 N.W.2d 920 (N.D. 1974) which prohibits suspended lawyer from "obtaining clients … retaining former clients … assuming responsibility for legal advice to clients … and for work product" and requires hiring lawyer to "make reasonable efforts to ensure that clients, courts, and other lawyers are aware that a legal assistant is not licensed to practice law"); *Penn. Bar Ethics Op.* 2007-3 (law firm may hire suspended lawyer, formerly associated with firm, to perform services limited to computer related technology, accounting and billing work which would not involve client contact, legal or paralegal work, given that such activities are not deemed "law related" work under Penn. Rule of Disciplinary Enforcement 217j which, among other things, provides that supervisory lawyer and formerly admitted lawyer file a notice of engagement and termination, if any, with the Disciplinary Board).

[44] *R.I. Ethics Op.* 2015-01 (January 20, 2015)(Lawyer may not hire a suspended lawyer, even out of state, as a legal researcher under state ethics rules, namely, Provisional Order No. 18, adopted as addendum to Rule 5.3, as follows: "A lawyer shall not use or employ as a legal assistant any attorney who has been suspended or disbarred [in Rhode Island]" or any other jurisdiction; See also Virginia Rule 5.5(b) which prohibits employment in any capacity of suspended or disbarred lawyer if lawyer was associated with the firm "at any time on or after the date of the acts which resulted in suspension or revocation" and Virginia Rule 5.5(c) pertaining to any other law firm employing a suspended or disbarred lawyer, as a "consultant, law clerk or paralegal," prohibiting that firm from representing any former clients of the suspended or disbarred lawyer or clients of the suspended or disbarred lawyer's former colleagues "represented after the wrongful acts engaged in by the paralegal that caused his or her license to be suspended or revoked");

Illinois: *http://www.state.il.us/court/SupremeCourt/Rules/Art_VII/artVII.htm#Rule762* IL Rule 764 ("Upon entry of the final order of discipline, the disciplined attorney shall not maintain a presence or occupy an office where the practice of law is conducted. The disciplined attorney shall take such action necessary to cause the removal of any indicia of the disciplined attorney as lawyer, counselor at law, legal assistant, legal clerk, or similar title.");

Massachusetts: *http://www.mass.gov/obcbbo/Rule401.pdf* Section 17, Paragraph 7 ("Except as provided in Section 18(4) of this Rule, no attorney who is suspended or disbarred or has resigned under the provisions of this Rule shall engage in paralegal work, and no lawyer or law firm shall knowingly employ, in any capacity, a person who is suspended or disbarred by any court or has resigned due to allegations of misconduct.");

New Jersey: *http://www.judiciary.state.nj.us/rules/r1-20.htm#20* NJ 1:20-20 ("Prohibited Association. No attorney or other entity authorized to practice law in the State of New Jersey shall, in connection with the practice of law, employ, permit or authorize to perform services for the attorney or other entity, or share or use office space with, another who has been disbarred, resigned with prejudice, transferred to disability- inactive status, or is under suspension from the practice of law in this or any other jurisdiction.")

Wisconsin: *https://docs.legis.wisconsin.gov/misc/scr/22/26* Wisconsin SCR 22.26 ("(2) An attorney whose license to practice law is suspended or revoked or who is suspended from the practice of law may not engage in this state in the practice of law or in any law work activity customarily done by law students, law clerks, or other paralegal personnel, except that the attorney may engage in law related work in this state for a commercial employer itself not engaged in the practice of law.").

assistants so long as the lawyer files a notice with the state bar and notifies affected clients.[45] The practice of hiring suspended or disbarred lawyers to perform law related services is generally considered a risk for both the hiring lawyer or firm and the suspended or disbarred lawyer. The hiring lawyer may be tempted to improperly rely on the suspended or disbarred lawyer's expertise and experience to perform legal services, with little or no supervision,[46] or become an "innocent victim of a designing employee."[47]

Failure to supervise and aiding the unauthorized practice of immigration law.

In the area of immigration law, as discussed above, a lawyer must not only take steps in providing adequate supervision to guard against the unauthorized practice of law by otherwise honest legal assistants who are authorized to communicate with clients directly, but also by those who through deceit and misrepresentation defraud vulnerable clients.

As a general matter, an immigration lawyer, or any other lawyer, cannot ethically delegate to a nonlawyer legal assistant the responsibility of establishing a lawyer-client relationship, maintaining direct contact with the client without supervision, giving legal advice without being supervised or exercising legal judgment on the client's behalf without being reviewed by the lawyer, since such conduct essentially amounts to the practice of law.[48] One frequently appearing scenario involves a lawyer with little or no experience in immigration law, enticed by the financial rewards of building an immigration practice, who employs a nonlawyer professing knowledge of immigration law and extensive contacts within a particular immigrant community, where the lawyer fails to provide any supervision. *In re Kaszynski*, 620 N.W.2d 708 (Minn. 2001), an especially flagrant example of this scenario, involved a lawyer with no experience in immigration law who was approached by a client who claimed to be familiar with immigration law because of his experience as a translator and legal assistant. The lawyer agreed to permit the nonlawyer to refer clients to his office and work on the cases as well. The lawyer gave the nonlawyer responsibility for client files and allowed him to interview clients, complete immigration forms, have ongoing communication with clients, and advise clients on legal fees, remedies, and procedure without adequate supervision. As a result of the lawyer's complete lack of supervision, the nonlawyer was able to hold himself out as lawyer, dispense legal advice, and ultimately steal clients' money by forging trust account checks and client money orders. The lawyer's eventual

[45] California RPC 1-311 provides in pertinent part:

(C) A member may employ, associate professionally with, or aid a disbarred, suspended, resigned, or involuntarily inactive member to perform research, drafting or clerical activities….

(D) Prior to or at the time of employing a person the member knows or reasonably should know is a disbarred, suspended, resigned, or involuntarily inactive member, the member shall serve upon the State Bar written notice of the employment, including a full description of such person's current bar status. ….. The member shall obtain proof of service of the client's written notice …

[46] *See, e.g., In re Juhnke*, 41 P.3d 855 (Kan. 2002) (lawyer who employed disbarred lawyer as legal assistant, but eventually aided him in the unauthorized practice of law by permitting him to meet with clients, prepare written contracts, pleadings and provide legal advice without supervision, even billing clients at same rate at which he billed for his own time, violated Rule 5.3(b)).

[47] *Matter of Martin*, SCBD No.5518.OBAD No. 1784 (Okla. September 21, 2010)(lawyer, apparently to help convicted nonlawyer felon (for purported "white collar crime") satisfy job requirement for probation, put nonlawyer on payroll for purposes of operating nonlawyer's pre-exisiting legal support business under lawyer's name and eventually defrauded clients, without conducting background check, taking steps to determine what services nonlawyer was providing or representations he was making to client, or otherwise engage in any meaningful supervision violated Rule 5.3(b); "lawyer gave the offender a home from which he could harm innocent people.")

[48] *See, e.g., Matter of Muto*, 291 AD2d 188 (1st Dept 2002) (immigration lawyer who engaged in numerous acts of misconduct, aided the unauthorized practice of law by accepting client referrals from nonlawyers, relying on them to perform legal work, such as consulting with the client without supervision, and in most cases, undertaking the representation without ever discussing the case directly with the client in the presence of a translator or otherwise ever meeting the client at all).

discharge of the nonlawyer did not excuse violations of numerous rules of professional misconduct, including Rule 5.3 and Rule 5.5, causing the lawyer to be disbarred.[49]

This example involving the flagrant abuse of supervision demonstrates that when the obligations and responsibilities imposed on lawyers under MR 5.3 are satisfied there is significantly less risk of the unauthorized practice of law and greater protection of vulnerable clients against fraudulent conduct that can ruin their lives. When the level of supervision satisfies the requirements of MR 5.3(b), a lawyer may more comfortably rely on nonlawyers to provide needed assistance in proving affordable legal services.[50]

Lawyer Authorization for Nonlawyer to Sign Lawyer's Name: Proper Handling of Immigration Forms and Submission of Court Papers

As discussed, a lawyer's failure to supervise under MR 5.3(b) or the ratification of misconduct under MR 5.3(c) may arise from a lawyer's practice of authorizing nonlawyer assistants to sign the lawyer's name on legal documents, such as HUD-1 statements for real estate loans. In cases involving real estate lawyers who routinely gave such authorization, lawyers were disciplined not because the "false" signatures violated a rule of professional conduct per se, but rather because the nonlawyers engaged in other misconduct that was facilitated by their being able to sign the lawyer's name.[51] In other words, the nonlawyer's authorized false signatures did not lead to a finding that the lawyer had engaged in "conduct involving dishonesty, fraud, deceit or misrepresentation" under MR 8.4(c), even though the failure to employ precautionary measures would amount to a violation of MR 5.3(a). In one of the cases,

[49] Other cases involving immigration lawyers who aided the unauthorized practice of law by nonlawyer immigration "consultants" include *Florida Bar v. Lawless*, 640 So. 2d 1098 (Fla. 1994)(immigration lawyer failed to supervise independent contractor paralegal in permanent residency immigration matter where clients paid legal fee to nonlawyer separate from that of lawyer and nonlawyer failed to provide the legal services clients had paid for); *Matter of Meltzer*, 293 A.D. 2d 202 (1st Dept. 2002)(immigration lawyer who formed a corporation with long time paralegal employee to provide legal services, namely, preparation and filing of immigration forms with then legacy INS, and associated with the corporation in capacity as lawyer, and where paralegal neglected three matters, lawyer was found responsible for paralegal's misconduct under DR -104(d) (predeccessor to Rule 5.3(c)) and aiding the unauthorized practice of law under DR 3-101 (predecessor to Rule 5.5)]; *Sneed v. Bd. Of Pro'l Responsibility*, 301 S.W.3d 603 (Tenn. 2010)(immigration lawyer who worked out of office of nonlawyer-owned business that performed "immigration work" assisted the unauthorized practice of law and failed to provide proper supervision of nonlawyer); *Matter of Jaffe*, 585 F.3d 118 (2d Cir. 2009) (immigration lawyer with volume practice employing nonlawyer assistants permitted them to prepare petitions for review for submission to the Circuit Court of Appeals which were woefully deficient, containing numerous errors and substantive omissions, attributed blame to her failure to review the briefs before filing; court found that her "explanation [was] a clear concession that she aided the unauthorized practice of law, in violation of D.R. 3-101(A) (predecessor to Rule 5.5) and that she improperly ratified and filed briefs drafted by unsupervised law students, in violation of D.R. 1-104(D) (predecessor to Rule 5.3(c));" *Florida Bar v. Flowers*, 672 So. 2d 526 (Fla. 1996)(lawyer permitted nonlawyer "immigration consultant" to lease space in his office suite leading unsuspecting prospective clients who met with the nonlawyer to believe they represented by the lawyer, even though they paid fees directly to immigration consultant; court found that lawyer violated Rule 5.3(c) by ratifying the misconduct of a nonlawyer associated with him"); *Matter of Rodkin*, 21 A.D.3d 111 (1st Dept. 2005)("by facilitating the provision of legal advice by agencies that are not constrained by the ethical rules that govern the legal profession, and by making no efforts to discredit, attempt to cure or even discover the agencies' errors, [r]espondent became part of the very problem [New York's rule against aiding UPL] was designed to address").

[50] Illinois Bar Op. 13-08 (it would not constitute unauthorized practice of law by out of state immigration lawyer to open office in Illinois for the practice of immigration law at which non-lawyer assistant would meet with immigration clients and take information to be used by the lawyer in filling out forms, as long as the nonlawyer works under the supervision of the out of state lawyer; the opinion noted however that immigration lawyer should proceed carefully in making sure level of supervision satisfies the requirements of MR 5.3(b)).

[51] *See, e.g., Atty Grievance Comm. Maryland v. Dore, 73 A.3d 161* (2013)(managing partner of firm with volume foreclosure practice violated Rule 5.3(a) by having procedures which authorized two trusted nonlawyer paralegals to sign documents, which apparently encouraged other nonlawyers to do so and falsely notarize lawyer's signature; lawyer did not have procedures in place for actual review of documents prior to filing; but lawyer not found to have violated Rule 8.4(c) because lawyer had good faith belief that he could authorize the signatures based on legal research and did not act with the intent to deceive); *Atty Grievance Committee of Md. v. Geesing*, 2013 334406, Md. Misc. Docket AG no. 36 (12/3/13)(lawyer manager of firm foreclosure practice violated MR 5.3(a) by having procedures in place which routinely permitted nonlawyer employees of firm to sign his name to documents, including notarized affidavits, based on good faith belief that such practice was legal so long as he adopted signatures upon review).

the court explicitly rejected the fraud charge on the basis that there was no evidence that the lawyer had intended to mislead anyone when he permitted the nonlawyers to sign his name and did not know that his signatures were being improperly notarized.[52]

Immigration lawyers filing petitions and applications they completed for clients sign a preparer's certification on each form and they also sign notices of appearance in each matter.. Immigration lawyers, especially solo practitioners, must exercise caution with respect to signatures. If, for example, a lawyer allowed a legal assistant to sign her name to immigration forms without reviewing them for errors, the lawyer would likely be found to have violated MR 5.3(b) because he failed to properly supervise the nonlawyer and MR 5.3(c) because she ratified the misconduct by, among others things, allowing the nonlawyer to sign her name.

There may, however, be exigent circumstances where an otherwise prudent and conscientious lawyer might feel justified in permitting a nonlawyer to sign her name. For example, an immigration lawyer may be called away from the office for an emergency before she has had a chance to sign a document that must be filed within hours for the client to obtain the requested relief. In such a situation the lawyer might authorize her legal assistant to sign her name—not for any nefarious reason—but solely to protect the client. Nevertheless, if the nonlawyer's signature does not disclose on its face that it is being signed by another person, the lawyer may be found to have engaged in a violation of the professional rules.

While it could be argued that the lawyer's conduct in the above example ought not give rise to discipline – especially on the basis that the lawyer acted in good faith under precedents cited in Note 53 below, the prudent and conscientious lawyer should make every effort to avoid such conduct. Solo practitioners in particular should have back-up plans for such contingencies where the attorney's signature is required on a document being filed before a deadline, such as having a reciprocal arrangement with a lawyer-colleague to sign a document as long as such conduct complies with local civil rules and law, and any other professional responsibility rule.

Ensuring Confidentiality: Of Course I Tell Nonlawyer Staff To Keep Things Confidential. Isn't That Enough?

As part of the immigration lawyer's supervisory or managerial obligation under Rule 5.3, a nonlawyer assistant should be provided with introductory and ongoing training as to confidentiality,

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[52] 73 A.3d at 169. There is also case law going back a few centuries holding that a person's name, when signed by another, constitutes a valid signature of that person if the person recognizes and acknowledges it. *See, e.g., Fisher v. McGuire*, 282 Md. 507 (1978)(in case involving validity of deed, court relied on 1814 decision under English law); *In re Barber*, 982 S.W.2d 364 (Texas 1988) (judgment still valid when a Texas judge directed his clerk to sign his name); *Conn v. Johnson*, 79 Mass App. Ct. 903 (criminal defendant's waiver to a jury trial was held to be ineffective since defendant did not sign the waiver, and the state's defense that defendant did not know how to read or write was inapplicable as waiver could have been signed by the hand of another); *Board of Trustees of Leland Stanford Jr. University v. Superior Court*, 57 Cal.Rptr.3d 755 (the "amanuensis rule" provides that a signature to an instrument may be attached by the hand of another, at the request of a party); *Gaspard v. Iberia Bank*, 953 So.2d 997 (where person's name is signed for him at his direction and in his presence by another, the signature becomes his own, and is sufficient to give the same validity to an instrument as though written by the person himself).

The principle, obviously, cannot be applied to a notarized signature or where there is a specific rule or regulation requiring a person to sign in her own hand.

Ethics opinions on the subject, while appearing to permit nonlawyer signatures on court documents, do so only when there is some type of disclosure that the signature is not in the lawyer's own hand. *See, e.g., North Carolina Ethics Op.* 2006-1 (under exigent circumstances a paralegal may sign lawyer's name to court documents as long as it does not violate law, court order, local rule or rule of civil procedure, lawyer provides appropriate supervision and the signature discloses on its face that it is by another's hand); *New Jersey Advisory Comm. Professional Ethics Committee Op.* 720 - UPL Committee 46 (paralegals may sign routine, non-substantive correspondence to clients, adverse lawyers, and courts, provided that supervising lawyers are aware of the exact nature of the correspondence, which must reflect identity of and non-lawyer status of the paralegal and the name of the responsible lawyer in the matter).

which should include a discussion of the types of information which are deemed confidential as well as the very limited situations in which information may be disclosed. The lawyer should also advise her nonlawyer assistants that under MR 5.3(c) she could be held responsible for their breach of confidentiality and that the paralegals risk termination of employment for violations of client confidentiality rules. Lawyers may also consider asking their nonlawyer staff to sign a memorandum of understanding indicating that they have received training as to confidentiality and agree to comply with the requirments of confidentiality to the best of their ability. Obviously, any office manual for staff should include information on confidentiality.

In addition to proper training, immigration lawyers should also have systems in place that allow for regular and frequent contact with paralegals to discuss the matters they are working on and respond to any questions or concerns as to confidentiality (or other relevant ethical issues). Doing so will help the immigration lawyer evaluate the paralegal's overall competence and grasp of the principles underlying the duty of confidentiality. Factors such as the nonlawyer's experience, trustworthiness and intelligence should be taken into consideration in tailoring the measures to be taken. An experienced paralegal might not need to be reminded of confidentiality, for example, as often as a new receptionist. However, a lawyer would be wrong in assuming that relying solely on training at the beginning of employment is sufficient to satisfy MR 5.3.

Special attention should be paid to the legal assistant's participation in social media. Legal assistants must be advised that third parties may attempt to gain access to information on their social media applications by use of false aliases or other fraudulent methods, and should refrain from discussing work related issues on social network sites in the same way that lawyers are so constrained.[53] Legal assistants must also be trained about the potential for revealing confidential information through metadata and the technical protective measures that can be employed.

Confidentiality is an especially important area of concern for immigration lawyers who use the services of nonlawyers as outside contractors to perform services on behalf of the client. These nonlawyers may be used by immigration firms on employer-based cases to reduce costs on higher volume matters like H-1B filings or labor certification applications for corporate employers. Immigration lawyers may need to collaborate with foreign lawyers on EB-5 cases to document the source of funds used for the investment and address foreign tax issues. Further, many immigration practices outsource translations, credential evaluations, and related non-legal work to outside agencies. In removal cases, lawyers hire expert witnesses for asylum cases on country conditions and for cancellation of removal cases requiring findings of medical, psychological, or economic hardship to family members. In each of the above examples, the nonlawyers will be privy to confidential information about the client. In addition to the specific supervisory obligations and responsibilities imposed under MR 5.3, the lawyer also has the general obligation under MR 1.6(c) to make reasonable efforts to prevent inadvertent disclosure or unauthorized access to confidential information, whether or not the lawyer has managerial or supervisory authority over the nonlawyer. As previously discussed, a lawyer who outsources law related work, should consider obtaining contractual assurances from the service providers regarding adherence to confidentiality requirements applicable to lawyers. For a detailed and comprehensive discussion of the lawyer's duty of confidentiality, applicable to a nonlawyer lawyer employed or retained by or associated with a lawyer under MR 5.3, see Compendium chapter on Rule 1.6, in general, and specifically the Special Areas of Concern section.

[53] *See, e.g.*, National Federation of Paralegal Associations (NFPA) Informal Ethics and Disciplinary Opinion No. 96-1 (discussing the paralegals duty of confidentiality as it relates to cyberspace).

Lawyer's Duty of Communication under Rule 1.4 and Use of Paralegals as the Primary Contact Person: I don't have time to talk to every client all the time.

Paralegals may have frequent contact with the immigration lawyer's clients. In many cases the client may find the paralegals more accessible than the lawyer, who is in court or meeting with other clients. They also may find it less intimidating to deal with a paralegal who speaks their language and shares their culture if that is the case. Nevertheless, it is still the lawyer's responsibility under MR 1.4 to adequately communicate with a client about matters relevant to the representation, such as promptly advising the client about any matter that would require informed consent, keeping the client up to date as to the status of the matter, and consulting with the client about the best ways to achieve the remedy sought.[54] A lawyer may delegate some of these tasks as well as the responsibility of interviewing clients and having clients sign documents in their presence, for example, but only when the lawyer supervises and in essence controls the quality of the communication.[55] For immigration lawyers, in particular, while it is certainly permissible to delegate client communication tasks to a legal assistant, lawyers must be very careful to select tasks that do not allow the legal assistant to provide critical legal advice to the client, such as decisions to appeal adverse decisions or pursue specific claims for relief from removal.

For instance, in response to a question involving a critical legal issue posed by a client, a lawyer could properly instruct the legal assistant to contact the client and inform her that the lawyer researched the client's question, if applicable, and provide the answer. A lawyer also could ask the legal assistant to conduct the research and suggest an answer, which the lawyer would then review. [In some circumstances, as discussed above, an experienced paralegal could be allowed to answer a question from a client about where to schedule a visa appointment based on the paralegal's handling of many similar appointments or a question concerning travel out of the country. As a general matter, however, the prudent and conscientious immigration lawyer should discourage the nonlawyer from elaborating on an answer on his own or answering a different question involving a critical issue of law.

Proper supervision therefore would normally require that a lawyer consider the nature and extent of contact between a paralegal and a client, as well as the nature as extent of direct contact between the lawyer and the client. While it may be possible in certain instances for a lawyer to provide legal services based solely on the legal assistant's functioning as an intermediary, such as the case of a non-profit immigration legal services provider, the lawyer may not forgo all direct communications with a client without violating rules relating to competence (MR 1.1), exercising professional judgment as an advisor

[54] MR 1.4 provides that:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

[55] *State Bar of Arizona Ethics Opinions*; 98-08 (October 10, 1999)(lawyer may ethically contract with a paralegal to have the paralegal assist with conducting initial interviews of and signing of documents by estate planning clients if the attorney supervises and controls the paralegal's activities to assure that the paralegal does not engage in the unauthorized practice of law and the initial interviews are only with existing clients and do not involve the solicitation of new business by the paralegal).

(MR 2.1), adequate communication with the client (MR 4.1(b)), aiding the unauthorized practice of law (MR 5.5(b)) and, of course, adequate supervision under MR 5.3.[56]

Further Guidance as to Ethical Usage of Nonlawyer Paralegals: Yes, I get it. I have to be careful in delegating tasks to paralegals, but MR 5.3 is not very specific.

In addition to MR 5.3, the ABA has established "Model Guidelines for the Utilization of Legal Assistant Services," which address several aspects of ethics, professional responsibility and UPL as they apply to the lawyer-legal assistant relationship. The guidelines specifically address the duties a legal assistant or paralegal may ethically perform and those that would constitute UPL, consistent with the Models Rules and our discussion of MR 5.3, cases and ethics opinions in this report. ABA Guideline 3 provides that a lawyer may not delegate to a paralegal the responsibility for establishing a lawyer-client relationship, establishing the fee to be charged for the legal service and for a legal opinion rendered to the client.[57] The ABA Guidelines also provide more ministerial advice such as Guideline 5 which provides that a lawyer may identify paralegals by name and title on her letterhead and business cards identifying the lawyer's firm.[58]

While lawyers are the intended audience for the ABA Model Guidelines discussed above, two organizations, The National Association of Legal Assistants, Inc. (NALA), and The National Federation of Paralegal Associations, Inc. (NFPA) have adopted guidelines of conduct directed solely to legal assistants and paralegals.[59]

Hypotheticals

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: Long Distance Supervision: Can it work?

A charitable non-profit organization in New York City offers immigration legal services at nominal cost to low income foreign nationals. The New York City office is run by a New York-licensed lawyer, Bob, who serves as the organization's director. The organization decides to

[56] *See, e.g., State Bar of Michigan Ethics Op.* RI-349 (July 26, 2010)(nonlawyer assistant may be directed by lawyer to communicate with client to gather information and communicate the lawyer's legal advice, but only where legal assistant's role does not go beyond expanding the lawyer's advice or providing legal advice independent of that articulated by the lawyer; although there might be rare instances in which a legal assistant might act as "an exclusive intermediary" between the client and the lawyer, such as where the lawyer's ability to exercise professional judgment is not dependent on personal contact, a lawyer's decision to forego all direct communication with the client runs the risk of violating numerous rules of professional conduct); *See also Kentucky Bar Assoc. v. Mills*, 318 S.W.3d 89 (Ky. 2010)(among other violations involving fraud on clients in a class action case, lawyer found to have violated Rule 1.4(b) "by delegating most of the responsibility of dealing with his clients… to his secretary/paralegal" and "knew that the people to whom he delegated authority were not fully informing his clients of their rights under the settlement agreement"; lawyer also found to have violated all three sections of Rule 5.3).

[57] The ABA Model Guidelines may be found at *http://apps.americanbar.org/legalservices/paralegals/downloads/modelguidelines.pdf*. As noted in the ABA guidelines some states have established their own guidelines specifically identifying the tasks that may ethically be a assigned to paralegals; *See, e.g., Colorado Bar Association Guidelines for the Use of Paralegals* (the Colorado Bar Association has adopted guidelines for the use of paralegals in 18 specialty practice areas including civil litigation, corporate law and estate planning); NALA Guideline 5. As noted in the ABA Guideline comments "incumbent on the lawyer to determine whether a particular task is properly delegable in the jurisdiction at issue."

[58] Lawyers are advised to check their home state's rules regarding lawyer letterheads since rules may vary.

[59] The NALA "Code of Ethics and Professional Responsibility" may be found at *http://www.nala.org/code.aspx*; The NFPA "Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement" may be found at *http://www.paralegals.org/Associations/2270/files/modelcode.html*.

open a branch office in Tarrytown, New York, a 45 minute train ride outside the city, as there is a great need in that community. The organization hires Smitty to run the branch office. Smitty is very knowledgeable about U.S. immigration law and licensed to practice law in his home country, but he is not admitted in New York or any other state in the U.S. The organization is assuming that Smitty will be able to obtain Board of Immigration Appeals (BIA) certification to represent foreign nationals before the USCIS and EOIR. Since the need is so great in Tarrytown, the organization decides to begin accepting new clients at the branch office before it is recognized by the BIA and before Smitty is certified by the BIA. The office in Tarrytown opens with a long line of foreign nationals waiting outside and Smitty begins meeting with them immediately. Bob, understanding the prohibitions against the unauthorized practice of law has instructed Smitty not to give legal advice to any of the branch's "clients" until he receives BIA certification.[60] Bob will rarely speak with any of the clients since he only visits the Tarrytown location about once a month. He is, however, available to Smitty each night to discuss issues and answer tough questions.

Analysis

This scenario covers the issue of whether a lawyer can properly supervise a nonlawyer without maintaining a physical presence at the location at which legal services are being provided, even if the nonlawyer is otherwise competent to handle the legal matters at issue. As discussed below, the arrangement will not likely comply with MR 5.3 unless additional measures were put into place. In reaching our conclusions we consider each applicable element of MR 5.3.

Does Smitty fall within the category of a nonlawyer under MR 5.3?

Yes. He is deemed a "nonlawyer" because he is not admitted to practice in any U.S. state, which under immigration rules and regulations is a prerequisite to representation of foreign nationals before the USCIS or EOIR

Under the proposed arrangement, do the obligations and responsibilities imposed under MR 5.3 apply to Bob?

Yes. First Smitty would be deemed a nonlawyer "associated" with Bob because they are employed by the same charitable organization, Bob is the director of the organization and has also agreed to directly supervise Smitty until he is BIA certified. In that sense Bob would be deemed to have both managerial and supervisory authority over Smitty. Under MR 5.3(a) he would have the obligation to put systems in place to provide reasonable assurance that Smitty's interactions with foreign national clients at the branch office were compatible with the rules of professional conduct. Under MR 5.3(b), unless Bob delegated direct supervision of Smitty to another lawyer which does not appear to be the case here, he would have the obligation as Smitty's direct supervisor of taking appropriate steps to ensure that he complied with the systems in place. Further because BIA certification only applies to representation before the USCIS and EOIR, Smitty would still be deemed a nonlawyer under MR 5.3.[61]

[60] Unless an office has an attorney on staff, each office location must be recognized by the BIA as an organization, and have at least one accredited representative on staff, in order to be legally providing immigration legal services.

[61] As a practical matter, even if Smitty was classified as a lawyer as a result of his BIA certification, which as discussed would not likely be justified, Bob would have almost identical supervisory obligations over Smitty under MR 5.1.

What rules of professional conduct are implicated, in addition to MR 5.3, by the plan to have Bob oversee Smitty's work until he is BIA certified?

Primarily, unauthorized practice of law, competence and diligence.

Since Smitty is not admitted in any state and is not BIA certified to represent foreign nationals before the USCIS or EOIR, Bob must take steps to ensure that Smitty does not engage in the unauthorized practice of law. That obligation will continue to some degree even when Smitty becomes BIA certified as there may be instances in which Smitty is asked to provide legal advice about matters under state law or may need to interpret state law. A common example might be whether when a client needs advice regarding the impact on his immigration status of a possible criminal conviction under state law Although there is no universally accepted definition of the practice of law, at a minimum, Smitty should not be giving the impression that he is a properly admitted lawyer or BIA certified representative authorized to provide legal advice. However, where a client's question is about whether he would be eligible for a driver's license based on his employment authorization document, it is unlikely that a nonlawyer working in a law firm or non-profit legal services organization would be found to have engaged in the unauthorized practice of law by answering that question based on public information available on websites. However, beyond relying on publically available information, Smitty should not provide legal advice or exercise independent professional judgment on any client's behalf, given Bob's low level of supervision (discussed below).

Is the level of Bob's supervision, as described above, sufficient to satisfy MR 5.3(a) or (MR 5.3(b)?

No. If the branch office arrangement is going to work at all, Bob would have to increase his presence at the branch office.

Under the current arrangement, because Smitty is neither BIA certified nor admitted to practice in any state, Smitty cannot appear as attorney-of-record or other authorized representative in any immigration matter. Bob would have to become attorney-of-record and this would create ethical problems for Bob. First, although there is no black letter authority that requires a lawyer to meet with his client in person, in order to provide competent and diligent representation, (or to provide adequate supervision over a nonlawyer), in most immigration law matters, the lawyer needs to have at least some direct contact, even if only through phone, email or other direct communications. Because most immigration cases have the potential to involve hearings, let alone interviews, an immigration lawyer needs to ascertain the credibility of the clients, by evaluating the client's honesty, intelligence and ability to articulate necessary facts, among other factors. This task cannot be delegated to a nonlawyer, and even if they are, they should at the very minimum also be confirmed by the lawyer.

In addition, even if it were ethically permissible for Bob to act as attorney-of -record without meeting the client face to face, Bob has not put systems in place that would ensure that Smitty's conduct was compatible with the rules of professional conduct. Bob's mere instruction that Smitty not provide legal advice is not sufficient, since the question of what amounts to legal advice is very fact sensitive. In a one-on-one consultation setting, it would be very hard for Smitty, a trained lawyer, not to offer his advice directly or implicitly. Even the decision as to what form to use is generally considered legal advice.[62]

Here, Bob has not set up any protocols for Smitty to follow. There is no indication, for example, that Bob has established a check-list for Smitty concerning substantive matters or ethical considerations such as the duty of confidentiality. The fact that Bob will be signing off on papers prepared by Smitty without

[62] *See generally* AILA Stop Notario Fraud *available at http://www.stopnotariofraud.org/faq.php.*

procedures in place to make sure the information is accurate is also problematic. Bob already has a full caseload of matters at the office he runs which makes day-to-day direct supervision impossible. The fact that Bob makes himself "available" in the evenings to handle Smitty's "tough" questions is not sufficient either since Bob is relying solely on Smitty to decide when to contact him and what questions to ask. What constitutes a "tough" question is purely a matter of judgment—here Smitty's. In addition, just being "available" does not provide assurance that Bob will have an opportunity to carefully review all forms or other papers prepared by Smitty. While there is no bright line rule as to the number of matters a lawyer may oversee, here, it appears that the number of client matters at the branch office will be substantial. This further limits the amount of time Bob would have to conduct meaningful review of Smitty's work.

In addition to Bob's liability under MR 5.3(a) or (b) in terms of setting procedures and enforcing them, Bob could easily be found responsible for Smitty's misconduct under MR 5.3(c) by virtue of having ratified the method by which Smitty would be interacting with the organization's clients, in the first place.

Assuming that both Bob and Smitty had the time, Bob might be able to satisfy the requirements for providing proper supervision under MR 5.3(a) and (b) if he met with Smitty on a regular basis, preferably once a week to go over all client matters and well before any papers were filed. Bob would have to make sure there was proper signage and documentation given to the clients to make clear to the clients that Smitty was not a lawyer and that even though they were seeking representation through the branch office, Bob would be the attorney-of record. In order to facilitate direct client contact, clients could "meet" with Bob through video conferencing. As discussed, Bob would also have to have written protocols in place applicable to the many different avenues of relief and a system in place by which Smitty would be held accountable to Bob for all of his work. Without these measures Bob would be running a high risk of violating MR 5.3.

Hypothetical Two: Expediency—When A Telephone Conversation Becomes Something More…

An immigration lawyer has had a thriving immigration practice serving primarily high-end clients for many years. She and other lawyers in the firm charge substantial consultation fees which is a significant source of income. She decides to expand her business by accepting DACA cases. In order to attract new clients, she decides to offer free consultations. For economic reasons she cannot use firm lawyers and plans to use paralegals instead. The paralegals will be given a short list of questions to ask callers over the phone. The questions, which can be answered yes or no, all concern the caller's eligibility for DACA. The paralegals will be instructed to ask only these simple yes or no questions. If the caller's answers to the questions indicate eligibility for DACA, the callers will be advised to make an appointment to meet with a lawyer at the firm. If the caller does not appear to qualify for DACA, based upon his or her answers, the paralegal will be instructed to advise the caller only that the firm cannot accept his or her case. The paralegal will state that the firm is not providing legal advice as to the merits of the caller's case and the caller should not interpret the firm's decision not to accept the case as an opinion on whether or not the caller qualifies.

Analysis

This scenario also covers the issue of proper supervision under MR 5.3 in the context of nonlawyer "consultations." Here the lawyer appears to have considered the obligations under MR 5.3 and has taken

steps which she believes in good faith will comply with the rule, but as explained below the steps are not sufficient. In reaching our conclusions we consider each applicable element of MR 5.3.

Do the nonlawyer paralegals fall within the category of nonlawyers within the reach of MR 5.3?

Yes, because paralegals are not lawyers and are being employed by the lawyer to provide law related assistance to her.

Is the lawyer acting in her capacity as a partner or other lawyer with managerial authority under MR 5.3(a) or direct supervisory authority under MR 5.3(b)?

Yes. In this scenario it appears that the lawyer would have obligations under each of these sections because she is both the managerial lawyer and the direct supervisory lawyer. Under MR 5.3(a) she would have the obligation to put systems in place to provide reasonable assurance that the paralegals' interactions with the callers were compatible to the rules of professional conduct. Under MR 5.3(b), unless she delegated direct supervision of the paralegals to another lawyer, she would have the obligation as a direct supervisor of taking appropriate steps to ensure that the paralegals complied with the systems in place, in particular, the instructions provided to them.

What rules of professional conduct are implicated, in addition to MR 5.3, by the lawyer's plan to have the paralegals conduct what is essentially a "screening" consultation over the phone?

Primarily unauthorized practice of law, confidentiality, conduct toward unrepresented persons and avoiding conflicts-of- interest.

Does the lawyer's proposed "free consultation" plan as described above satisfy the obligations imposed under MR 5.3(a) and (b)?

No, but it could with certain modifications.

First, although not directly related to MR 5.3, the lawyer's characterization of the telephone conversation as a "consultation" is not accurate. As a practical matter, the use of the term consultation creates the expectation that the caller would be getting legal advice as to whether he qualified for DACA.[63] Since that may not be the case, the interaction should be called something like a "screening interview."

Second, the lawyer's plan does not contain sufficient safeguards to reasonably ensure that the paralegals would not provide legal advice or create the false impression that they are lawyers. Advising the callers after the fact that no legal advice was provided does not make it so.

In order to dramatically—and reasonably—reduce the risk that legal advice without supervision might be dispensed, the paralegals should be required to work from a script that explains at the inception of the call exactly what will take place, in particular, that the paralegal will be asking X number of questions related to DACA to be answered only by a yes or no. The paralegal would have to inform the caller that she is conducting a screening intake on DACA and that she is not able to answer questions about other avenues of immigration relief because she is not a lawyer. The paralegal should also receive training as to other rules implicated by the plan, namely the duty of confidentiality (MR 1.6), respect for third parties (MR 4.3) and avoiding conflicts-of-interest (MR 1.7 and MR 1.9).[64] The caller should also

[63] *See* definition of "Consult": to seek information or advice from (someone with expertise in a particular area): Have discussions or confer with (someone), typically before undertaking a course of action. *http://www.oxforddictionaries.com/us/definition/american_english/consult*

[64] *See* MR 4.3 concerning a lawyer's contact with unrepresented persons; *see* MR 1.7 and 1.9 concerning conflicts of interest; Marian C. Rice Maintaining a Conflict-Checking System, Volume 39 Number 6.
http://www.americanbar.org/publications/law_practice_magazine/2013/november-december/ethics.html

be advised that whatever information provided will be kept confidential whether or not she retains the firm. The paralegals should have a manual.

The lawyer's plan to let the paralegal decide whether the caller qualifies for DACA and advising the caller to set up an appointment with the lawyer based on that decision presents possible ethical problems. Even if the decision is made in a mechanical way solely on the basis of the yes or no answers, the decision is still being made by the paralegal not the lawyer. *However, the paralegal may be authorized to assess the merits of the case based on the clear guidance already provided by the lawyer for callers who are clearly ineligible based on their age or date of entry.* Further, even if the paralegal did not explicitly advise the caller that he did not qualify and only advised that the firm cannot accept the caller's case, the caller would likely reach the conclusion that she does not qualify. It appears that the lawyer here is really trying to prevent her nonlawyers from offering advice about qualification, but the procedures she has chosen will not likely accomplish that goal.

The safest course would be to limit the paralegal's duties to obtaining the yes or no answers only. Any communication about whether the firm would be accepting the representation should be handled by the lawyer, after reviewing the yes or no answers. The lawyer could delegate the responsibility of contacting the client to the paralegal to set up an appointment, however. Where the client does not qualify, the lawyer would have to oversee any communication on the subject by notifying the caller that in the lawyer's opinion she did not qualify and also advising that the caller may still wish to consult with another lawyer about DACA or any other possible avenue of relief. While not required, best practice would be to notify the client in writing.

Another alternative would be for the nonlawyer to read the questions requiring yes or no answers to the caller, advise as to what would disqualify the caller and let the caller decide whether he qualifies for DACA and wishes to make an appointment with the lawyer. This could serve to reduce the number of unqualified persons making appointments (which would benefit the lawyer) and save the caller the time and money associated with making the appointment (which would benefit the caller).

Hypothetical Three: Oops! We Hate When That Happens—But What To Do?

The Smith Immigration Law Firm represents Oisip Djugashvili in connection with an adjustment application. Smith is a solo practitioner with a support staff of three nonlawyers: two legal assistants and a secretary. During the course of the representation, Djugashvili provided Smith with his U.S. tax returns. At the conclusion of the case, Djugashvili requested that his tax returns be mailed to him. Smith immediately directed that his chief legal assistant, Doreen, mail a copy of the tax returns to Djugashvili. It was Smith's office policy to list the client's address only on the outside of the file. Doreen pulled the file, but failed to notice an AR-11 in the file, which showed that Djugashvili had recently changed his address, after having had a serious falling out with his wife. Dorene mailed the tax returns that same day by regular mail to the old address listed on the outside of the file at which Djugashvili's estranged wife still resided. Five days later, Djugashvili called Smith, inquiring about the tax returns. After Doreen told Smith she mailed the returns five days ago. Smith reviewed the file and discovered that the tax returns had been mailed to the old address. Smith was very concerned not only because of Doreen's error but also because Djugashvili likely had not wanted his wife to see his tax returns. Smith pondered for several days trying to figure out how to explain to Djugashvili that his privacy had likely been violated. Before Smith took any action, Djugashvili called Smith again. In the conversation, Smith blamed Doreen for the mistake.

Analysis

Is Smith's legal assistant Doreen a nonlawyer within the reach of MR 5.3?

Yes.

Is Smith subject to the obligations of both a manager and a supervisor under MR 5.3?

Yes. Since Smith is a solo practitioner he has both managerial and supervisory obligations under MR 5.3.

What rules of professional conduct, in addition to MR 5.3, are implicated by the legal assistant's sending the client's tax returns to the wrong address?

If the tax returns are deemed confidential, MR 1.6 would be implicated. For purposes of the analysis, since we are told that Smith represents only Mr. Djugashvili, we assume that the tax returns and any other documents in the file are confidential and may not be disclosed without his consent. MR 1.3, requiring diligent representation, might also be implicated based on the premise that diligent representation requires that a lawyer maintain proper office procedures requiring attention to detail and avoiding sloppy practices.

May Smith be held liable for violating the obligations and responsibilities under MR 5.3?

It depends, in the first instance, on whether Smith had procedures in place to ensure that his legal assistant had the most up to date client contact information and whether he took steps to ensure that his legal assistant complied with such procedures.

Smith would be obligated under MR 5.3(a), as a lawyer with managerial authority, to implement such measures to ensure that his nonlawyer staff complied with the rules of professional responsibility. Ensuring that all communications with clients are confidential is certainly one of the obligations. Here, it Smith did not have an adequate system in place to record changes in a client's contact information other than maintaining a hard copy of any change of address information form in a client's file. This was not adequate because the only way that the legal assistant could learn of the change of address was to examine every document in the file. Smith could have set procedures requiring support staff to record the change of address manually on the outside of the file, on a contact sheet inside the file or electronically upon receipt or preparation of any change of address information. For example, many immigration lawyers use commercial software to maintain client contact information and other significant events concerning the representation. Since Smith did not have such procedures in place, he would be liable under MR 5.3(a). Without such procedures in place, the only way Smith could avoid direct supervisory responsibility under MR 5.3(b) would be if Smith had specifically instructed the legal assistant to check the file for any change of address information before she mailed it or to contact the client by phone to check his mailing address.

If Smith had implemented such procedures and his legal assistant just simply failed to follow them, Smith should not be found to have violated MR 5.3(a).

Smith should also not be responsible under MR 5.3(c). He did not direct or ratify the wrongful conduct [under MR 5.3(c)(1)]. He also had no knowledge of the wrongful mailing at a time when he could have prevented its consequences [under MR 5.3(c)(2)]. The same conclusion would be reached even if Smith had exercised proper managerial and supervisory authority, but his legal assistant overlooked the procedures. As long as a lawyer can establish that he complied with MR 5.3(a) and (b), he should not be liable for what would otherwise be characterized as a mistake. Lawyers are only required to employ

precautionary measures that are "reasonable". To hold a lawyer ethically responsible for all nonlawyer misconduct on a strict liability basis would be unreasonable.[65]

Hypothetical Four: When A "Good Deed" Goes Punished…

Jones, a solo practitioner, represents William Brown, a U.S. citizen, and his new wife, Nadia, a citizen of The Philippines. Nadia had entered the U.S. on an L-1 visa, but she was no longer employed with the L-1 employer when she met William. She had been out of status since they had started dating shortly after she quit her job. William and Nadia were married after the couple learned that Nadia was pregnant. They retained Jones to file a concurrent I-130 Petition for Alien Relative and the I-485 Application for Adjustment of Status, along with the I-131 application for an advance parole travel authorization.

After a few months, the USCIS issued the notice for interview, and while preparing Nadia and Brown for the interview, Jones learned that Nadia had traveled to The Philippines to visit her mother, and that she departed the U.S. before the approval of the I-131 and issuance of the advance parole document. When Jones expressed dismay, Nadia told him that prior to departing the U.S., she telephoned his office to advise him of her plans. Nadia spoke with Doris, Jones's new legal assistant whom Nadia had never met. Nadia tells Jones that Doris advised her that it was okay to travel to The Philippines, and that her husband could send the parole document for use when re-entering the U.S. Nadia never received the advance parole document. Without contacting Jones's office again, Nadia decided to use her L-1 visa, rather than waiting for the advance parole authorization, and she was admitted without any questions.

While Doris's advice would not have been wrong if Nadia had followed it, Nadia's return to the U.S. on an L-1 visa when she was no longer working for the L-1 employer was a misrepresentation that jeopardized her marriage-based application. Jones was dismayed that he was not aware of Doris's conversation with Nadia. He would have followed up with William and Nadia to make sure Nadia had the required advance parole travel document, preferably before leaving the U.S. He also would have explained in very certain terms that Nadia's L-1 visa was not valid for travel after she had quit her job.

Analysis

This scenario, like hypothetical 3, concerns a nonlawyer's conduct undertaken without the lawyer's knowledge.

Is Jones's legal assistant a nonlawyer within the reach of MR 5.3?

Yes, she is a nonlawyer employed by Jones to provide services related to his practice of law.

Do the obligations imposed under MR 5.3(a) and (b) apply to Jones?

Yes. Since he is a solo practitioner, clearly he has managerial authority over all nonlawyers within the rule. Since the scenario does not indicate that he has delegated direct supervisory authority to any other lawyer (or that he even could), Jones has supervisory authority over his Doris, his legal assistant. Under either MR 5.3(a) or (b), Jones has the obligation to establish systems designed to ensure that

[65] Whether or not Smith might be found to have engaged in malpractice on the basis of his legal assistant's mistake is a different matter. Unlike liability under rules of professional responsibility, a mistake without more can be a basis for a finding of malpractice. *See* discussion of legal malpractice cases in Compendium chapters for MR 1.1 and MR 1.3.

Doris's conduct is compatible with the professional rules applicable to lawyers and also to follow through on steps necessary to enforce those systems.

What professional rules are implicated, in addition to MR 5.3, by the legal assistant's provision of legal advice to a client?

Unauthorized practice of law

Here, Doris provided legal advice to Nadia independently and then without advising Jones of Nadia's inquiry at the time she rendered the advice.

Does it appear that Jones satisfied his obligations under MR 5.3(a) or (b)?

No. The only information provided about Jones's legal assistant is that she was "new" and had not even met Nadia. There is no evidence presented that Jones had taken appropriate managerial and supervisory measures concerning the scope of the services that can be provided by a nonlawyer legal assistant. In particular, there is no evidence that Jones had discussed with Doris what amounts to the practice of law or even provided the simple instruction not to answer any law related questions posed by a client or otherwise provide any advice. In fact, it appears that Doris had no clue that she was not supposed to provide legal advice. Moreover, Jones does not appear to have had any systems in place providing that his legal assistant advise Jones of any client inquiries, whether she addressed them or not. Had Doris timely advised Jones of the substance of Nadia's call or even that she had called at all, Jones might have had the opportunity to discover Doris's conduct and taken action to remedy it. The fact that Jones did not get regular updates from Doris about client calls suggests he may have been too hands off in supervising Doris generally.

Jones could only avoid liability under MR 5.3(a) or (b) if he were able to demonstrate that he had provided sufficient training and supervision to his legal assistant about legal advice, even if the nonlawyer provided it in good faith. If he had such systems in place and his legal assistant engaged in the misconduct anyway, he would not be liable under MR 5.3(a) or (b). Violations of MR 5.3(a) and (b) arise from failing to take reasonable precautionary measures. It is always possible that Doris was aware that her conduct was prohibited, but decided to engage in it nevertheless. Doris also might not have had the ability to comprehend the legal and ethical concepts at issue, notwithstanding proper training. However, since the level of supervision that is appropriate is dependent on a numbers of factors, including the nonlawyer's capacity to benefit from training,[66] and since Jones as a solo practitioner would have been in a position to determine if Doris were competent, it would be hard for Jones avoid liability for failure to supervise on the basis that Doris was simply incompetent.

Given that Jones's legal assistant clearly engaged in misconduct, is Jones responsible under MR 5.3(c)?

Probably No. Jones would not be liable under MR 5.3(c)(1) because he did not direct his legal assistant to provide legal advice and he also did not ratify the conduct since he did not know of the conduct at the time it occurred. There is no evidence that he had signaled in any way that Doris could provide legal advice, which could, depending on the circumstances, be deemed ratification. Similarly, he would not be liable under MR 5.3(c)(2) since he had no knowledge of the misconduct at a time when he could remedy it. In the scenario, he did not learn that Doris told Nadia that it was okay to leave the country until Nadia had already left and returned. If Doris had reported her conversation with Nadia

[66] Comment 1 to MR 5.3 advises in pertinent part that the "measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline."

timely, Jones could have contacted Nadia to discuss her proposed travel and provide more comprehensive advice. Such action by Jones would amount to remedial action under MR 5.3(c)(2).[67] Although there was no possibility of such remedial action, Jones might still be ethically obligated under his duty of diligence (MR 1.3) to recommend Nadia's pursuit of alternate legal strategies to obtain adjustment of status .[68] While further legal work on Nadia's behalf might serve to mitigate any damages caused by Doris's faulty legal advice, it would not shield Jones from vicarious liability in a malpractice action.[69]

Hypothetical Five: Escrow Accounts—As Long As You Don't Steal Any Money, You're OK!—Wrong!

Two lawyers , who had worked as associates at a large firm opened a law partnership for the practice of immigration law. They had very little experience with the proper handling of operating and escrow accounts since they had relied on the former firm's accounting and bookkeeping department. Because they wanted to devote as much time as possible to building their practice, the lawyers decided to hire a part-time bookkeeper to manage their escrow and operating accounts in accordance with the requirements of MR 1.15 ("safekeeping property"). The bookkeeper they hired had been recommended by the manager of the nearby office supply store for her honesty. The lawyers planned to charge a flat fee which covered both the legal work performed and any filing fees. They remembered from an ethics course they had taken in preparation for the bar five years before that under "one of the rules," such fees were to be held in an escrow account to be transferred to the operating account as earned. The only instructions provided by the partners to the bookkeeper, who apparently had no prior law firm experience, were that she should never allow the escrow account to have a negative balance and that she should not make any online transfers from one account to the other without their permission. All checks were to be signed by one of the partners.

Within a year the partners had a very successful immigration practice with over 1000 active cases. Due to the increased activity in the accounts, on occasion the bookkeeper made online transfers without telling the lawyers and also lost track of the identification of the funds. On occasion the escrow accounts showed a negative balance which the bookkeeper remedied by retransferring available funds from the operating account to the escrow account without informing the lawyers. At one point when there were insufficient funds in the operating account, she deposited $275 of her own money in the escrow account, which she later withdrew when the balance was sufficient. She eventually expressed a general concern to the lawyers about the condition of the "books", without disclosing past discrepancies. In response, the lawyers bought her a 150 page manual on the proper handling of lawyer bank accounts issued by the state bar association, which they had never personally reviewed. They also did not personally review the monthly bank statements as a matter of practice and did not do so even thereafter. They believed that, as long as no client had complained about not receiving funds due them that, the bookkeeper was doing her job. A year later, during the course of a disciplinary investigation arising from a client's complaint of neglect and incompetence in the handling of a permanent

[67] Assuming that this is the first time Jones's secretary engaged in the misconduct or that there were no red flags of such behavior, there is no evidence to establish that Jones engaged in conscious avoidance of the misconduct.

[68] Jones could, for example, recommend that Nadia file a new application for adjustment of status, which should hopefully avoid a denial of adjustment. Further discussion of the immigration rules and regulations applicable here are beyond the scope of this EC.

[69] *See* discussion of malpractice cases in EC on MR 1.1 and 1.3.

residency matter, the lawyers were asked, as a matter of course, to produce the required bank records under MR 1.15 and the ABA rules for client trust accounts. The lawyers were not able to provide them because the bookkeeper had not maintained many of the original bank records and had failed to keep a ledger. As a result the lawyers were not able to account for the source of funds held in their accounts or disbursements as required, among other things. In an effort to defend against a finding that the lawyers had violated MR 1.15, they blamed the bookkeeper.

Analysis

This scenario concerns supervision in an area in which immigration lawyers may not have competence in the first instance—escrow accounts. In such cases, a lawyer is charged with the responsibility of either obtaining competence or taking steps to ensure that a person with competence can perform the needed tasks in accordance with the professional rules of responsibility.

Is the firm's part-time bookkeeper a nonlawyer within the reach of MR 5.3?

Yes, she is a nonlawyer employed to provide services related to law firm activity.

Do the obligations imposed under MR 5.3(a) and MR 5.3(b) apply to the lawyers even if they do not appear to have competence in the area of safeguarding client funds and bank account management and rely instead on a bookkeeper?

Yes. Here, the lawyers shared managerial and supervisory authority over the bookkeeper. Under either MR 5.3(a) or MR 5.3(b), they shared the obligation to establish systems designed to ensure that the bookkeeper's handling of the firm's bank accounts was compatible with the professional rules applicable to lawyers and also to follow through on steps necessary to enforce those systems. Even if the lawyers had agreed that only one of them would assume managerial and supervisory authority over the bookkeeper, MR 5.3 would likely be apply to the other lawyer because it was only a two lawyer firm and neither partner was competent in bookkeeping.

What professional rules are implicated, in addition to MR 5.3, by the bookkeeper's mishandling of escrow and operating account funds and faulty recordkeeping?

Safeguarding client property under MR 1.15 and the ABA Model Rules for Client Trust Account Records.[70]

Here, the bookkeeper was charged with the complete responsibility of safeguarding client funds and otherwise following applicable accounting practices.

Does it appear that the lawyers satisfied their obligations under MR 5.3(a) or MR 5.3(b)?

Not even close! First, there is no evidence that the lawyers were competent in the area of client trust and operating accounts management in the first instance or undertook any efforts to become competent. A lawyer, for example, could not take adequate measures to ensure that a nonlawyer legal assistant complied with the duty of confidentiality without knowledge of the specific requirements of MR 1.6. The same applies to bookkeeping. While neither MR 5.3 nor MR 1.15 requires that a lawyer personally prepare a ledger or perform monthly reconciliations of a bank account, the lawyer must at least know that proper bookkeeping under MR 1.15 (and the client trust account records rules) requires such measures. MR 5.3 would require at a minimum that the lawyer ascertain that a bookkeeper has the requisite knowledge and ability to comply with the rules and then to monitor the bookkeeper's activities to endure that he is doing

[70] *See* Rule 1 ("Recordkeeping Generally"), Rule 2 ("Client Trust Account Safeguards"), and Rule 3 ("Availability of Records") at *http://www.americanbar.org/content/dam/aba/migrated/cpr/clientpro/adopted_8_10_10.authcheckdam.pdf*.

so. Among other things, since both lawyers knew that the bookkeeper had no law firm experience, their failure to take appropriate precautionary measures is even more egregious.

There is no evidence that the lawyers ever discussed the applicable professional rules to the bookkeeper when they hired him; nor did they ever consult the bar association manual they gave him to read. Similarly, they took no action to confirm that the bookkeeper had read the manual, understood the concepts and procedures discussed in the manual or implemented any practices set forth in the manual. They had no ongoing meaningful discussions with the bookkeeper about the accounts and most importantly, never undertook a first-hand review of the records. If they had, the lawyers would at least have learned of the negative balances.

Given that the bookkeeper clearly engaged in misconduct by failing to comply with MR 1.15 and the client trust account records rules, are the lawyers responsible under MR 5.3(c)?

Yes. The bookkeeper's failure to comply with MR 1.15 and the ABA trust account records rules resulted in what appears to be misappropriation of client funds by reason of the negative balances, failure to keep track of the source and disbursement of client funds, failure to maintain and produce bank records and failure to keep client funds separate by reasons of the transfer of earned funds from the operating account to the escrow account to make up for the negative balances, among others. While there is no evidence that the lawyers had actual knowledge of the misconduct, which normally would be required under either prong of MR 5.3, the lawyers lack of any meaningful supervision (even after the bookkeeper in effect signaled her inability to properly manage the accounts) would amount to conscious avoidance of the misconduct warranting responsibility. Further, the lawyers would also be responsible under MR 1.15 which imposes liability based on a lawyer's non- delegable fiduciary duty.

Hypothetical Six: We Can Trust You—When a Drop of Water Can Cause a Flood

A small law firm's practice of immigration and family law increased dramatically after the creation of DACA. To keep up with the numerous filings, the firm hired additional nonlawyer legal assistants, resulting in an increase from two highly trusted and experienced legal assistants (the "senior legal assistants") to eight. The six new hires had no prior training or experience. For that reason, the new hires were required to participate in a one-day general orientation conducted by the senior legal assistants and thereafter lawyers and senior legal assistants were available to provide further instruction on an as needed basis. In order to satisfy the firm's touted client-service policy of fast turnaround times, immigration lawyer John, who had been assigned to supervise all the legal assistants, thought it would be a good idea to allow legal assistants to sign his name to the applications once he had reviewed them for accuracy. John had researched case law and rules concerning this practice in civil matters and came to the conclusion that it was permissible to allow a person to sign another's name as long the person explicitly authorizes the signature and stands by the contents of the document. John spoke to the managing partner about the plan and they agreed, to be on the safe side, to allow only the senior legal assistants to do so.

Shortly thereafter, a few of the new hires observed that the senior legal assistants were signing the lawyer's name to documents. They shared their observations with the other new hires and thereafter all the new hires began signing the immigration lawyer's name to documents and pleadings rather than waiting for the lawyer to sign them. Where the "false" signatures required notarization, such as on affidavits to support the DACA application, the new hires relied on one of the other new hires to notarize them. In three instances, one new hire signed and filed documents without providing them to the lawyer for final review. Three months after the firm

instituted the practice, one of the senior legal assistants advised the lawyer that she had discovered that the new hires also had been signing his name on documents. The lawyer was shocked to learn this and even more shocked to find upon further investigations that one of the new hires had signed and filed several documents which he had never reviewed. He immediately reported the situation to the managing partner of the firm who terminated the new hire who had filed documents that John had never reviewed and the new hire who had falsely notarized the lawyer's signature. He reprimanded the other new hires for signing the lawyer's name to documents without obtaining authorization to do so and failing to seek advice about the conduct from a lawyer or senior legal assistant. The managing partner then distributed a memorandum to all lawyers and nonlawyers explicitly prohibiting nonlawyers from signing a lawyer's name to any document that did not otherwise disclose that the signature was not in the lawyer's and without the lawyer's consent.

Analysis

Are the firm's nonlawyer legal assistants within the reach of MR 5.3?

Yes, they are nonlawyers employed to provide services related to law firm activity.

Do the obligations imposed under MR 5.3(a) and/or MR 5.3(b) apply to immigration lawyer John assigned to supervise the nonlawyer legal assistants? Do they apply to the managing partner?

Here both rules apply to immigration lawyer John, but only MR 5.3(a) would apply to the managing partner. MR 5.3(a) likely applies to John because he was assigned to supervise the nonlawyer legal assistants as a group, came up with the idea of having the senior legal assistants sign his name to immigration documents and participated in the decision making process with the managing partner to implement the plan. In short John would be deemed to have managing authority under MR 5.3(a). MR 5.3(b) would clearly apply to John since he was given direct supervisory authority over all the legal assistants, in particular in connection with the immigration work. MR 5.3(a) clearly applies to the managing partner because of his overall duties, but also because he specifically approved the plan to have the two legal assistants sign immigration lawyer John's name to documents. Because the managing partner did not directly supervise the legal assistants, MR 5.3(b) would not apply to him.

What professional rules are implicated, in addition to MR 5.3, by the legal assistants' signing the lawyer's name to documents (with or without his permission) and procuring false notarizations?

False statements to third parties in a client matter (MR 4.1), violating or attempting to "violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another" (MR 8.4(a); Dishonest Conduct (MR 8.4(c)), Conduct Prejudicial to Administration of Justice (MR 8.4(d).

Did the managing partner and John satisfy their respective obligations under MR 5.3(a) and MR 5.3(b)?

Mostly, no.

Despite their arguably good intentions, the managing partner and John opened an ethical Pandora's box when they decided to allow the two senior assistants to sign John's name to documents with John's approval. While they could argue that in doing so there was no intent to defraud any person or governmental authority since John had approved the substance of the documents and authorized the legal assistants to sign his name, the fact remains that John's signature was not what it appeared to be. Since signing someone else's name to a document even with permission, may even despite legal

authority possibly violate a professional responsibility rule applicable to a lawyer for this reason, neither the managing partner nor John could support the conclusion that they undertook appropriate precautionary measures to reasonably ensure that the two senior legal assistants complied with the rules applicable to lawyers.

The same rationale would apply to the nonlawyers who were not authorized to sign John's name. To the degree that there might be some circumstances under which a legal assistant could ethically sign a lawyer's name to a document without disclosing that the signature was not in the lawyer's hand (and we do not envision any here), neither the managing partner nor John took any precautionary measures to ensure that the new hires were not authorized to do so. There is no indication, for example, that the new hires were advised that only the senior legal assistants were so authorized. Indeed, there is no indication that there was any kind of general discussion about this departure from normal procedures. The fact that the conduct went on for three months without coming to the attention of John or the managing partner suggests a careless attitude toward supervision- as does the fact that one new hire signed John's name to documents that had not been approved prior to filing. Most glaring is the fact that some of the new hires used another new hire to falsely notarize John's signature. Since every Notary knows that it is improper to notarize a signature outside the presence of the signatory, that a firm's notary would even consider doing so –coupled with the wrongful actions of the other new hires– indicates that the managing partner and John basically dropped the ball with respect to proper supervision under MR 5.3(a) or MR 5.3(b).

Would either the managing partner or the supervising lawyer be held responsible for the senior legal assistants' misconduct in signing the lawyer's name even with his permission?

Yes, under MR 5.3(c) since both lawyers ratified the conduct and in the case of the supervising lawyer John, he actually directed the legal assistants to do so on an ongoing and regular basis. However, if this was a one time or rare occurrence under exigent circumstances, did not involve a notarized signature and the lawyer supervised the preparation of the application, our answer would change to "Maybe."

Are either the managing partner or the supervising lawyer ethically responsible for the false notarization of the lawyer's signature?

Mostly likely, no. Neither directed or ratified the conduct as required under MR 5.3(c)(1) and neither had knowledge of the conduct at a time when either could have taken remedial action.

Are either the managing partner or the supervising lawyer ethically responsible for the new hires' misconduct in signing the lawyer's name without his permission?

Mostly likely, no. Neither the managing partner nor the supervising lawyer had knowledge of the new hires' misconduct at a time when they could have done taken remedial action.

The above scenario is instructive well beyond the specific facts involving the false signature issue. Proper supervision under MR 5.3 may require more than adequate training and oversight. Immigration lawyers—and others who rely on nonlawyer support staff—should remember the importance of creating an office-wide culture of compliance with ethical rules and excellence in the provision of legal services. Supervision by definition has its limitations but nonlawyers who work in an environment which stresses ethics and competence in the rendering of legal services are more likely to conduct themselves in a manner that is compatible with those concepts.

E. Summary of Rule 5.3 Variations by Jurisdiction

ABA Model Rule 5.3 details the duties lawyers have when managing nonlawyers employed by, retained by, or associated with them. The Model Rules require certain lawyers to act affirmatively when supervising nonlawyers: (1) a partner (or lawyer who possesses "comparable managerial authority" in a law firm) is required to make "reasonable efforts" to ensure that the firm has established a means of ensuring that the nonlawyer's conduct complies with the lawyer's professional obligations; and (2) a lawyer who is not a partner, but has "direct supervisory authority" over a nonlawyer, is required to make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the lawyer's professional obligations. Model Rule 5.3 also holds a lawyer responsible for a nonlawyer's conduct when either: (1) the lawyer orders or ratifies the conduct; or (2) the lawyer is a partner (or has "comparable managerial authority") or has "direct supervisory authority" over a nonlawyer, knows of the conduct at a time when consequences could be avoided, and fails to take "reasonable remedial action." Forty-nine states[71] and the District of Columbia provide ethical guidelines for lawyers managing nonlawyer activities that could violate the states' respective ethical rules. Thirty states apply the current version of Model Rule 5.3.[72] As discussed in detail below, fifteen jurisdictions[73] have modified the text of Model Rule 5.3 in some way. Additionally, five states[74] continue to use the pre-2002 version of Model Rule 5.3.

Pre-2002 Version of Model Rule 5.3

Alabama, Hawaii, Massachusetts, Michigan, and West Virginia continue to use the pre-2002 version of Model Rule 5.3, which substantively differs from the current version of the Rule. In contrast to the current version of the Rule that refers to partners and other individuals with similar "managerial authority" in the law firm[75], the 2002 version of the Rule refers only to partners.[76] In addition, the pre-2002 version of the Rule does not include comments on nonlawyers outside of the firm.[77]

Jurisdictions That Have Modified Text of Model Rule 5.3

Alaska

Alaska's variation of Rule 5.3 contains the full text of the Model Rule, but also places several additional requirements on its lawyers. First, Alaska requires a lawyer to instruct nonlawyer subordinates who leave their positions to refrain from disclosing any secrets learned while working under the lawyer's supervision.[78] Second, Alaska requires a lawyer supervising a nonlawyer to instruct

[71] The California Rules of Professional Conduct do not include a rule providing ethical guidelines for lawyers managing nonlawyer activities that could violate the Rules of Professional Conduct.

[72]Those states are Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

[73] These jurisdictions are Alaska, the District of Columbia, Florida, Georgia, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, Texas, and Virginia.

[74] The following states continue to use the pre-2002 version of Model Rule 5.3: Alabama, Hawaii, Massachusetts, Michigan, and West Virginia.

[75] "[A] partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer . . . " MR 5.3.

[76] "[A] partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer . . ." Pre-2002 MR 5.3.

[77] *See* Comments 3 & 4 to MR 5.3.

[78] "A lawyer shall advise a nonlawyer who ends an association with the lawyer not to disclose confidences and secrets protected by Rule 1.6 that were learned by the nonlawyer during the association." AK Rule 5.3(b).

the nonlawyer to refrain from disclosing confidences protected by Rule 1.6, which governs a lawyer's duties to keep certain information confidential. Third, Alaska's version of Rule 5.3 requires a lawyer to conduct screening procedures to ensure that nonlawyers are not staffed on matters that would create a conflict of interest under either Rule 1.7 or Rule 1.9.[79] Fourth and finally, a lawyer who learns that his or her employee has improperly disclosed a protected confidence or secret must notify the affected person.[80]

District of Columbia

The District of Columbia's variation of Rule 5.3 places the same requirements on lawyers as the Model Rule, but slightly expands its scope. Unlike the Model Rule, which only makes specific references to "partners" and individuals with "comparable managerial authority" at law firms, the District of Columbia's variation specifically places within its scope lawyers with comparable managerial authority at a government agency.[81]

Florida

Florida's variation of Rule 5.3 explicitly requires that "law firms" as well as lawyers directly supervise paralegals and legal assistants. Florida's rule provides that a lawyer must review and is responsible for the work product of such a nonlawyer, even if the nonlawyer's work is conducted outside the presence or "active involvement" of the lawyer.[82] It is also worth noting that Florida's rule applies to "authorized business entities" in addition to law firms.[83]

Georgia

Georgia's version of Model Rule 5.3 contains the full text of the Model Rule, but adds a section prohibiting lawyers from allowing a suspended or disbarred lawyer in the office from engaging in activities that constitute the practice of law or might lead to the practice of law. Prohibited activities for a suspended or disbarred lawyer include: (1) holding himself or herself out as a lawyer; (2) having any contact with the lawyer-supervisor's clients; or (3) having contact with individuals who have legal dealings with the office.[84]

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[79] "A lawyer who employs, retains, or forms an association with a nonlawyer shall advise the nonlawyer not to disclose confidences and secrets protected by Rule 1.6 learned by the nonlawyer during an association with another lawyer. If the nonlawyer participated in a matter that would create a conflict of interest for a lawyer under Rule 1.7 or Rule 1.9, the nonlawyer shall be screened from any participation in the matter." AK Rule 5.3(c).

[80] "A lawyer who learns that any person employed by the lawyer has revealed a confidence or secret protected by these rules shall notify the person whose confidence or secret was revealed." AK Rule 5.3(d).

[81] "A partner or a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or government agency shall make . . . ." DC Rule 5.3(a).

"A lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . [t]he lawyer has direct supervisory authority over the person, or is a partner or a lawyer who individually or together with other lawyers possess comparable managerial authority in the law firm or government agency . . . ." DC Rule 5.3(c)(2).

[82] "Although paralegals or legal assistants may perform the duties delegated to them by the lawyer without the presence or active involvement of the lawyer, the lawyer shall review and be responsible for the work product of the paralegals or legal assistants." FL Rule 4-5.3(c).

[83] "With respect to a nonlawyer employed or retained by or associated with a lawyer or an authorized business entity . . ." FL Rule 4-5.3(b)(1).

[84] "[A] lawyer shall not allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer, to: 1. represent himself or herself as a lawyer or person with similar status; 2. have any contact with the clients of the lawyer either in person, by telephone or in writing; or 3. have any contact with persons who have legal dealings with the office either in person, by telephone or in writing." GA Rule 5.3(d).

Montana

Montana's variation of Rule 5.3 contains the text of the Model Rule, but expands the circumstances in which a lawyer can face liability for a nonlawyer's conduct. In addition to providing that a lawyer is responsible for a nonlawyer's prohibited conduct if the lawyer orders or ratifies that conduct, Montana provides that a lawyer can also be responsible for a nonlawyer's actions if the lawyer is aware of, but nonetheless ignores, the unethical conduct.[85]

New Hampshire

New Hampshire's variation of Rule 5.3 contains the text of the Model Rule, but explicitly states that the Rule applies to "each" partner and "each" lawyer possessing managerial authority in a law firm.[86] This slight change emphasizes that obligations under Rule 5.3 cannot be delegated to one lawyer; rather, all lawyers at the firm who manage nonlawyers are subject to the New Hampshire's version of Rule 5.3.[87]

New Jersey

New Jersey's variation of Rule 5.3 changes the text of the Model Rule in several ways. First, New Jersey requires a lawyer to adopt and maintain reasonable efforts—rather than simply making reasonable efforts—to ensure that the conduct of nonlawyer subordinates complies with the lawyer's obligations.[88] Second, unlike Model Rule 5.3(c)(2), which holds partners and other lawyers with "managerial authority" responsible for certain conduct by nonlawyers,[89] New Jersey's rule applies only to lawyers who (1) have direct supervisory authority over a nonlawyer, and (2) know of nonlawyer conduct that violates New Jersey's ethical rules.[90] Third and finally, New Jersey's variation of the Model Rule provides that a lawyer also can be held responsible for the unethical conduct of a nonlawyer subordinate if that lawyer failed to investigate circumstances suggesting the nonlawyer's propensity for such misconduct.[91]

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[85] "[A] lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer orders or, with the knowledge of the specific conduct, ratifies or ignores the conduct involved . . ." Rule 5.3(c)(1).

[86] "Each partner, and each lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer. . ." NH Rule 5.3(a).

[87] "The New Hampshire version of the rule differs from the ABA Model Rule only in the substitution of 'each' for 'a' in sections (a) and (b). The change is intended to emphasize that the obligations created by the rule are shared by all of the managers of a law firm and cannot be delegated to one manager by the others." Ethics Committee Comment to NH Rule 5.3.

[88] "[E]very lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer." NJ Rule 5.3(a).

[89] "[A] lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." MR 5.3(c)(2).

[90] "[A] lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action . . ." NH Rule 5.3(c)(2).

[91] "[A] lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if . . . the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct." NJ Rule 5.3(c)(3).

New York

New York's variation of Rule 5.3 deviates from the Model Rule in several ways. First, the obligation to ensure that the work of nonlawyer employees is adequately supervised applies to a law firm (as opposed to individual lawyers with managerial authority). Lawyers at the firm with direct supervisory authority over nonlawyers must also adequately supervise the subordinates' work.[92] Second, New York's variation of Rule 5.3 expressly outlines factors to consider when determining the extent of supervision required, including, for example, the experience of the person whose work the lawyer is overseeing, the amount of work involved in a particular matter, and the likelihood that ethical problems may arise.[93] Finally, New York's rule holds a lawyer responsible for a subordinate's violations of the state ethics rules not only when the lawyer actually knows of the misconduct, but also when the lawyer "reasonably should know" of the unethical conduct.[94]

North Carolina

North Carolina's variation of Rule 5.3 largely mirrors the Model Rule, but includes a slight textual change that does not have a substantive impact on its application. North Carolina adds the phrase "to avoid the consequences" to the last sentence of the Model Rule, so that a lawyer is responsible for a nonlawyer's conduct if the lawyer knew of the conduct in time to avoid or mitigate it, but failed to take "reasonable remedial action to avoid the consequences."[95]

North Dakota

North Dakota's variation of Rule 5.3 allows lawyers to delegate to nonlawyer subordinates tasks that are typically performed by lawyers, "except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority or [North Dakota's ethical rules]."[96] For example, North Dakota Rule 5.3 prohibits delegating to a nonlawyer either the

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[92] "A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate." NY Rule 4-5.3(a).

[93] "In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter." *Id.*

[94] "A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated." N.Y. Rule 4-5.3(b)

[95] "[A] lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
(2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences." NC Rule 5.3(c).

[96] "In addition to paragraphs (a), (b) and (c), the following apply with respect to a legal assistant employed or retained by or associated with a lawyer: (1) A lawyer may delegate to a legal assistant any task normally performed by the lawyer except those tasks proscribed to one not licensed as a lawyer by statute, court rule, administrative rule or regulation, controlling authority, or these Rules.

(2) A lawyer may not delegate to a legal assistant:

(i) responsibility for establishing a lawyer-client relationship;

responsibility for the work product or the responsibility for rendering a legal opinion to a client.[97] Additionally, the North Dakota rule requires lawyers to make "reasonable efforts" to ensure that clients, courts, and other lawyers are aware that the nonlawyer is not licensed to practice law.[98]

Ohio

Ohio's variation of Model Rule 5.3 omits the Model Rule's specific reference to a "partner" but still imposes obligations on any lawyer with managerial authority. It also adds language requiring lawyers with managerial authority in government agencies to make reasonable efforts to ensure that their agency has mechanisms in place to prevent nonlawyers from violating the state's ethical rules.[99] Additionally, the Ohio rule provides that lawyers at government agencies who possess managerial authority over nonlawyers are responsible for the actions of nonlawyer subordinates when those lawyers both (1) know of the conduct at a time where any consequences can be avoided or mitigated, and (2) fail to take reasonable remedial action.[100]

Oregon

Oregon's variation of Model Rule 5.3 omits the first section of the Model Rule, which outlines the duties of partners and other lawyers who have managerial authority over nonlawyers at law firms.[101] Instead, Oregon imposes the obligation to ensure that the nonlawyers' conduct complies with the lawyers' professional obligations only on lawyers "having direct supervisory authority" over nonlawyers.[102]

(ii) responsibility for establishing the amount of a fee to be charged for a legal service;

(iii) responsibility for a legal opinion rendered to a client; or

(iv) responsibility for the work product.

(3) The lawyer shall make reasonable efforts to ensure that clients, courts, and other lawyers are aware that a legal assistant is not licensed to practice law." ND Rule 5.3(d).

[97] *Id.*

[98] *Id.*

[99] "[A] lawyer who individually or together with other lawyers possesses managerial authority in a law firm or government agency shall make reasonable efforts to ensure that the firm or government agency has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer." OH Rule 5.3(a).

[100] "[A] lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

(2) the lawyer has managerial authority in the law firm or government agency in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." OH Rule 5.3(c)(2).

[101] "With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (b) except as provided by Rule 8.4

(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." OR Rule 5.3.

[102] *Id.*

Rhode Island

Rhode Island has not made any changes to the text of or comments to Model Rule 5.3,[103] but has added a set of ten guidelines immediately following the Rule that limit a lawyer's use of legal assistants.[104] The fifth guideline, for example, allows a nonlawyer to sign correspondence relating to the

[103] "With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." RI Rule 5.3.

[104] "1. A lawyer shall not permit a legal assistant to engage in the unauthorized practice of law. Pursuant to Rules 5.3 and 5.5 of the Rhode Island Supreme Court Rules of Professional Conduct, the lawyer shares in the ultimate accountability for a violation of this guideline. The legal assistant remains individually accountable for engaging in the unauthorized practice of law.

2. A legal assistant may perform the following functions, together with other related duties, to assist lawyers in their representation of clients: attend client conferences; correspond with and obtain information from clients; draft legal documents; assist at closings and similar meetings between parties and lawyers; witness execution of documents; prepare transmittal letters; maintain estate/guardianship trust accounts; transfer securities and other assets; assist in the day-to-day administration of trusts and estates; index and organize documents; conduct research; check citations in briefs and memoranda; draft interrogatories and answers thereto, deposition notices and requests for production; prepare summaries of depositions and trial transcripts; interview witnesses; obtain records from doctors, hospitals, police departments, other agencies and institutions; and obtain information from courts. Legal documents, including, but not limited to, contracts, deeds, leases, mortgages, wills, trusts, probate forms, pleadings, pension plans and tax returns, shall be reviewed by a lawyer before being submitted to a client or another party.

In addition, except where otherwise prohibited by statute, court rule or decision, administrative rule or regulation, or by the Rules of Professional Conduct, a lawyer may permit a legal assistant to perform specific services in representation of a client. Thus, a legal assistant may represent clients before administrative agencies or courts where such representation is permitted by statute or agency or court rules.

Notwithstanding any other part of this Guideline,

1) Services requiring the exercise of independent professional legal judgment shall be performed by lawyers and shall not be performed by legal assistants.

2) Legal assistants shall work under the direction and supervision of a lawyer, who shall be ultimately responsible for their work product.

3) The lawyer maintains direct responsibility for all aspects of the lawyer-client relationship, including responsibility for all actions taken by and errors of omission by the legal assistant, except as modified by Rule 5.3(c) of the Rules of Professional Conduct.

3. A lawyer shall direct a legal assistant to avoid any conduct which if engaged in by a lawyer would violate the Rules of Professional Conduct. In particular, the lawyer shall instruct the legal assistant regarding the confidential nature of the attorney/client relationship, and shall direct the legal assistant to refrain from disclosing any confidential information obtained from a client or in connection with representation of a client.

4. A lawyer shall direct a legal assistant to disclose that he or she is not a lawyer at the outset in contacts with client, court, administrative agencies, attorneys, or, when acting in a professional capacity, the public.

5. A lawyer may permit a legal assistant to sign correspondence relating to the legal assistant's work, provided the legal assistant's non lawyer status is clear and the contents of the letter do not constitute legal advice. Correspondence containing substantive instructions or legal advice to a client shall be signed by an attorney.

6. Except where permitted by statute, or court rule or decision, a lawyer shall not permit a legal assistant to appear in court as a legal advocate on behalf of a client. Nothing in this Guideline shall be construed to bar or limit a legal assistant's right or obligation to appear in any forum as a witness on behalf of a client.

7. A lawyer may permit a legal assistant to use a business card, with the employer's name indicated, provided the card is approved by the employer and the legal assistant's non-lawyer status is clearly indicated.

8. A lawyer shall not form a partnership with a legal assistant if any part of the partnership's activity involves the practice of law.

nonlawyer's work as long as the correspondence does not contain substantive legal advice and the nonlawyer's status is clear.[105] Although these "guidelines" may appear to be mere reference points, the guidelines are rules adopted by court order.[106]

Texas

Like Oregon's variant, the Texas variation of Model Rule 5.3 omits any specific references to the duties of partners or other similarly situated lawyers employed at law firms, and instead emphasizes "direct supervisory authority."[107] Additionally, the Texas rule expands the circumstances under which a lawyer may be subject to discipline as a result of a nonlawyer subordinate's conduct. Under the Texas rule, a lawyer may be disciplined when he or she "orders, encourages, or permits" a nonlawyer subordinate's prohibited conduct.[108] Finally, Texas specifically provides that the "general counsel of a government agency's legal department in which the person is employed, retained by or associated with" is responsible for nonlawyer subordinates' conduct.[109]

Virginia

Like New York's version of Model Rule 5.3, Virginia's holds a lawyer responsible for a nonlawyer's conduct if the lawyer "should have known" of the nonlawyer's misconduct but failed to take appropriate remedial action.[110] Virginia's rule also refers to "managerial authority" rather than "comparable managerial authority."

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9. Compensation of legal assistants shall not be in the manner of sharing legal fees, nor shall the legal assistant receive any remuneration for referring legal matters to a lawyer.

10. A lawyer shall not use or employee as a legal assistant any attorney who has been suspended or disbarred pursuant to an order of this court, or an attorney who has resigned in this or any other jurisdiction for reasons related to a breach of ethical conduct." RI Guidelines, Provisional Order No. 18.

[105] *Id.* ¶ 5.

[106] *See* Provisional Order No. 18, 454 A.2d 1222 (R.I. 1983).

[107] "With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts

to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) a lawyer shall be subject to discipline for the conduct of such a person that would be a violation of these rules if engaged in by a lawyer if:

(1) the lawyer orders, encourages, or permits the conduct involved; or

(2) the lawyer:

(i) is a partner in the law firm in which the person is employed, retained by, or associated with; or is the general counsel of a government agency's legal department in which the person is employed, retained by or associated with; or has direct supervisory authority over such person; and

(ii) with knowledge of such misconduct by the nonlawyer knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of that person's misconduct." TX Rule 5.03.

[108] *Id.*

[109] *Id.*

[110] "With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Barry Walker

Maya Bangudi

Reid Trautz

Maheen Taqui

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(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." VA Rule 5.3.

American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 5.5
Unauthorized Practice of Law;
Multijurisdictional Practice of Law

Sherry K. Cohen, Reporter

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MODEL RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICEOF LAW

Introduction

It's complicated! That might be an apt way of describing the practice of law in the United States. The traditional scenario of a lawyer maintaining a practice limited solely to matters involving the law of one state is becoming increasingly more challenging. National law firms have offices throughout the country and many have expanded their practices to states in which some of their lawyers are not admitted. In other cases, lawyers not admitted in a particular state or others without a law degree may be permitted under state or federal law to provide services that traditionally have been described as the practice of law. Washington state recently implemented procedures in which nonlawyers may be licensed to provide law related services, some of which might otherwise have been deemed the practice of law.[1] These developments pose thorny questions for the legal profession concerning the circumstances under which lawyers may ethically and legally practice law.

Because immigration lawyers know they are permitted to provide immigration representation to clients before Immigration Courts, the Board of Immigration Appeals and the United States Citizenship and Immigration Services (USCIS) in any state as long as they are in good standing in one state and not otherwise subject to any order of suspension or disbarment,[2] many may not be concerned about engaging in the unauthorized practice of law (UPL). However, there still may be concerns for immigration lawyers who practice before various tribunals in different states and represent clients from different states. In particular, immigration lawyers may not be clear as to which jurisdiction has disciplinary authority over their conduct and which rules of professional responsibility apply.

In addition, in the day-to-day practice of immigration law, there are any number of circumstances that may trigger an unauthorized practice of law issue.

- Immigration clients might ask their lawyers for advice about a state law issue, such as a personal injury matter or the purchase of a home. An immigration client may ask her lawyer to prepare a will or loan agreement, as a favor. A former immigration client located outside of the lawyer's home jurisdiction may request assistance in a criminal matter in the other state. Assuming the immigration lawyer is competent in the area of law, he may be tempted to provide such services. Would providing legal services to immigration clients based on a state's criminal law present UPL issues?
- Immigration lawyers, like many others, rely heavily on the services of paralegals or other nonlawyers in the course of representing immigration clients. An immigration lawyer may want to establish a second office in a nearby state staffed only by her paralegal. Many non-profit immigration service providers employ large numbers of nonlawyers that provide immigration law related services purportedly under the supervision of lawyers. A non-lawyer community organizer may refer immigration clients to an immigration lawyer and provide translations services for a fee. In what way may a lawyer's business relationship with a nonlawyer trigger a UPL issue?
- Immigration lawyers, like others—who may not have the income to support a physical office or who choose to operate their practice through a "virtual office"—serve clients in states in which they are not admitted. Would such practice amount to UPL?
- Immigration lawyers, like others, may advertise their services in jurisdictions in which they are not

[1] For detailed information concerning the Washington State "Limited License" program, see Washington State Bar Association at http://www.wsba.org/licensing-and-lawyer-conduct/limited-licenses/legal-technicians.

[2] 8C.F.R § 292.1 authorizes any U.S. lawyer to practice immigration law. A U.S. lawyer is defined as "any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law."

admitted through the use of websites, traditional print advertising, radio and television advertising or social media sites such as Facebook, Twitter or LinkedIn. How do the rules governing advertising interact with rules governing UPL?

MR 5.5 addresses these questions and more.[3] We summarize the provisions below:

The first paragraph, MR 5.5(a), states the common understanding that a lawyer may only practice in a jurisdiction in which he is authorized to practice. In other words, a lawyer may not engage or assist another to engage in UPL.

The second paragraph, MR 5.5(b), helps clarify the prohibition against UPL by providing that lawyers not authorized to practice in an out-of-state jurisdiction may not maintain a physical office, sometimes referred to as a "brick and mortar" office, for their practice or engage in any other "systematic and continuous presence" in that jurisdiction, e.g., a "virtual" office. In addition, non-admitted lawyers are not permitted to hold out to the public that they are authorized to practice in that jurisdiction.

The third paragraph, MR 5.5(c) provides *exceptions* under which a non-admitted lawyer may provide legal services on a "temporary" basis in an out-of-state jurisdiction.[4] These exceptions, together with those in MR 5.5(d), make up what is often referred to as "multi-jurisdictional practice" and reflect the practical realities of law practice today.[5] Each of the exceptions in MR 5.5(c) apply only to the *temporary* practice of law. The first permits the non-admitted lawyer to practice if he associates with local counsel who must actively participate in the matter. The second exception permits the non-admitted lawyer to practice in a matter that is subject to resolution by a tribunal under limited circumstances, among them, that the services pertain to the matter before the tribunal and that the lawyer has been or reasonably expects to be admitted pro hac vice. The third exception is similar to the second exception, but applies to a matter that is subject to alternate dispute resolution, where the legal services pertain to the matter at hand and there is no requirement for pro hac vice admission to appear in the arbitration or mediation. The last exception, which covers matters other than those before a tribunal or alternate dispute resolution, permits a non-admitted lawyer to provide temporary legal services if the services "arise out of" or are "reasonably related" to the lawyer's practice in her home jurisdiction. The last exception has been read to apply to transactional matters.[6] In some jurisdictions, the scope of this exception is more limited than the ABA Model Rule. In South Carolina, for example, the exception is limited to representation of an "existing client" in the jurisdiction in which the lawyer is admitted to practice.

The fourth paragraph, MR 5.5(d), provides two exceptions that permit non-admitted lawyers to practice in an out-of-state jurisdiction on a *permanent* basis. Under MR 5.5(d)(1) a non-admitted U.S. or non-U.S, admitted lawyer (a "f*oreign* lawyer") may provide legal services to his employer on a permanent basis, i.e., in-house counsel or a government lawyer, as long as pro hac vice admission is not otherwise required. If a foreign in-house counsel needs to provide legal advice on matters involving state or U.S. law, he must obtain the advice of a duly admitted lawyer.[7] Many jurisdictions require in-house counsel to apply for and obtain a limited certificate of admission. Under MR 5.5(d)(2) a non-admitted lawyer may also practice on a permanent basis if authorized by federal law or other law. The federal law applicable to immigration practice is 8 C.F.R § 292.1, which

[3] Lawyers may find the text of MR 5.5 and the Comments at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html.

[4] We use the phrase "out-of-state" jurisdiction instead of the phrase "foreign jurisdiction" to avoid confusion with the use of the phrase "foreign lawyer" used in MR 5.5(d). The terms "non-admitted lawyer" and "out-of-state lawyer" will be used interchangeably. A "foreign lawyer" is one who is admitted in an out-of-the-country jurisdiction.

[5] A sizable majority of states have adopted some form of multi-jurisdictional practice, even if they have not adopted MR 5.5 verbatim. Lawyers should review the Summary of State Variations below and check the applicable state's version of MR 5.5.

[6] See ABA Annotated Model Rules, Rule 5.5 at p. 466.

[7] As discussed below, this requirement was added when MR 5.5(d)(1) was amended to permit foreign admitted lawyers to practice as in-house counsel. Lawyers should check the applicable state's version of MR 5.5 for any variation from this sub-section. See Summary of State Variations below.

authorizes "attorneys" to serve as representatives in immigration matters. "Attorney" is defined under 8 C.F.R. § 1.2 as "any person who is eligible to practice law in, and is a member in good standing of the bar of, the highest court of any State, possession, territory, or Commonwealth of the United States, or of the District of Columbia, and is not under any order suspending, enjoining, restraining, disbarring, or otherwise restricting him or her in the practice of law." MR 5.5(d)(2) thus provides a safe harbor, as it relates to professional responsibility, for the immigration lawyer who maintains an immigration practice on a systematic and continuous basis in a state (or states) in which she is not admitted.

The fifth paragraph, MR 5.5(e), limits the scope of paragraph four by requiring that the non-admitted U.S. or foreign lawyer be in good standing in his home jurisdiction (not disbarred or suspended) and be subject to regulation and discipline by appropriate authorities.[8]

By way of background, MR 5.5 was amended in 2002 to include the multi-jurisdictional exceptions. Prior to that, lawyers who provided legal services in states in which they were not admitted were subject to professional discipline for engaging in UPL and as a practical matter could even be denied legal fees for services that were deemed to be UPL.[9] One of the most notable cases involving denial of legal fees to out-of-state lawyers was Birbower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1 (Cal. 1998). In Birbrower, a New York law firm represented a California subsidiary of one of its New York clients in settling a contract dispute in California. The firm lawyers who were not admitted in California provided legal services that involved meeting with officers of the California client, filing a claim with the American Arbitration Association in San Francisco, interviewing potential arbitrators in California and negotiating the eventual settlement of the dispute before it went to arbitration. In denying the legal fees, the court ruled that the non-admitted Birbrower lawyers engaged in UPL based on their "continuing relationship with a California client that included legal duties and obligations" through contacts in the state. Presumably because of the harsh results in Birbrower, California later enacted a statute allowing a lawyer licensed in another state to represent a party to an arbitration proceeding in California upon approval of the arbitrator and notice to the State Bar.[10] The Birbower case also has been described as a precipitating factor in the movement to amend MR 5.5.[11]

Like so many other model rules, MR 5.5 should not be read in a vacuum. Other rules, such as MR 8.5 (disciplinary jurisdiction and choice of law, also amended in 2002), MR 7.1 (truthful communications about lawyer's services) and MR 7.5(b) (jurisdictional disclosures in letterheads) have a direct bearing on the multi-jurisdictional exceptions. Non-admitted lawyers also should be mindful of rules relating to competence (MR 1.1), diligence (MR 1.3), limitations of services (MR 1.2) client communications (MR 1.4), and fee sharing (MR 5.4(a)), among others.

We begin by discussing the key terms used in MR 5.5, followed by annotations and commentary on each sub-section of the rule, including citations to ethics opinions and disciplinary decisions. We will also address special concerns for immigration lawyers namely, (1) virtual practices and bona fide office requirements, (2) advertising and multi-jurisdictional practice and (3) jurisdiction and choice of law issues triggered by multi-jurisdictional practice. In addition, because many state versions of MR 5.5 vary, we will provide a description of state variations

[8] The term "admitted" applies to lawyers in good standing – not suspended, disbarred or inactive. See e.g., In re Convsisser 242 P3d 299 (NM 2010) (inactive status in home state precludes practice of law on temporary basis in another state).

[9] See e.g., Koscove v. Bolte, 30 P.3d 784 (Colo. Ct. App. 2001) (non-admitted lawyer denied fees because he engaged in UPL by investigating and pursuing client's claim for royalty payments through contemplated litigation before obtaining pro hac vice admission); Off.of Disc. Counsel v. Fucetola, 753 N.E.2d 180 (Ohio 2001)(out-of-state lawyer enjoined from further engaging in UPL after he filed civil complaint in Ohio at the same time as he filed for pro hac vice admission, but appeared in court before motion granted).

[10] Cal. Code Civ. Pro. Section 1282.4; Cal. Ct. Rule 983.4. As discussed above, the exceptions in MR 5.5 (c) are consistent with any informal pro hac vice requirements that the out-of-state jurisdiction may impose. We remind non-admitted lawyers seeking to practice outside of their home jurisdiction to check the out-of-state jurisdiction's regulatory scheme regarding informal licensing or pro hac vice admission in addition to checking any variations from MR 5.5.

[11] See *ABA Annotated Model Rules*.

of MR 5.5. Lastly, we will provide and discuss various immigration law hypotheticals involving the application of MR 5.5 and related rules.

Prudent and conscientious lawyers should always carefully review the applicable state's version of MR 5.5, or any other Model Rule referenced in this chapter.

A. Text of Rules

ABA Rule 5.5— Unauthorized Practice of Law; Multijurisdictional Practice of Law

To review the full text of MR 5.5 and the comments, please visit the *Model Rules of Professional Conduct: Table of Contents* on the American Bar Association's website.

B. Key Terms or Phrases

Practice of Law

Although "practice of law" may be viewed as a term of art, it is not defined in the Models Rules.[12] Nevertheless, there are core elements to the practice of law which have been adopted by most states. They include in the first instance services which are provided to a particular person or entity who seeks assistance in a matter affecting his legal rights.[13] The services to be performed require appropriate training in the law and the exercise of professional judgment in applying the law to the facts.[14] Other definitions include the providing of legal advice, representations of persons in court and holding oneself out as being capable of providing legal advice.[15] We discuss the practice of law in greater detail below at pp. 1-6.

Systematic or Continuous Presence versus Temporary Presence

MR 5.5 distinguishes between a lawyer's regular and temporary presence for the practice of law in a jurisdiction. Under MR 5.5(a) a lawyer may practice on a continuous and systematic basis by maintaining a traditional physical location with a reception area, offices and meeting rooms or a "virtual office" in which services are provided through the internet, telephonically and other means. As such, virtual offices may also constitute a "presence" through the use of a website or an advertising campaign targeting clients in a particular jurisdiction. Virtual offices do not require a particular physical location in the jurisdiction or, in many cases, even in-person contact.[16] Under MR 5.5(a), unless a lawyer is otherwise authorized, lawyers who provide legal services in a state in which they are not admitted are deemed to be engaging in the unauthorized practice of law.

MR 5.5 broke new ground when it was amended in 2002 to allow a non-admitted lawyer to maintain a presence in an out-of-state jurisdiction if the legal services are provided on a temporary basis under limited circumstances. The term "temporary" is not defined and as the Comments acknowledge there is "no single test" to determine if legal services are provided on a "temporary basis." To help clarify, the Comments state that legal services may be deemed temporary even if they occur on a recurring basis over time, or concern only one matter for an extended period of time. An example of the latter would be representation in a single lengthy negotiation or litigation.[17] We discuss temporary practice in more detail below.

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[12] Attorney Grievance Commission of Maryland v. Shaw, 354 Md. 636, 732 A.2d 876, 882 (1999) ("The term practice of law' is a 'term of art connoting much more than merely working with legally-related matters.'") (quoting In re Application of Mark W., 303 Md. 1, 491 A.2d 576, 585 (1985)).

[13] See in Rowe, 341-42(1992)(suspended lawyer's article on legal rights of psychiatric patients is not the practice of law since it does not involve "the rendering of legal advice and opinions directed to particulars clients.")

[14] See proposed ABA definition. http://www.americanbar.org/groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition.html.

[15] The ABA Task Force on the Model Definition of the practice of law has generated a state-by-state survey of the definitions of the practice of law which may be found at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.

[16] A lawyer may be able to interact with a client through the use of technology such as "Skype" or more sophisticated teleconferencing.

[17] See Comment 6 to MR 5.5.

Association with a Lawyer who Participates in the Matter

The term "association" with a lawyer found in MR 5.5(c)(1), the first exception, is also not a defined term but is understood to mean the non-admitted lawyer's retention of local counsel. The local counsel is required to participate in the proceedings in a meaningful way, which includes sharing responsibility for the representation. As discussed in more detail below at pp. 21-13 under MR 1.4, the non-admitted lawyer would normally be required to inform the client about the retention of local counsel. In addition, many states have specific rules governing local counsel which require disclosure and client approval of the arrangement.[18]

Reasonably Related

The term "reasonably related" appears in three of the remaining exceptions that permit temporary practice. In MR 5.5(c)(2) and MR 5.5(c)(3), the second and third exceptions, the lawyer's temporary provision of legal services must be "reasonably related" to a matter before a tribunal or an arbitrator/mediator in the out-of-state jurisdiction, respectively. The term "reasonable" or "reasonably" is defined under MR 1.0(h) as applying to "the conduct of a reasonably prudent and competent lawyer." The services also should be related in a meaningful way to the same matter in the lawyer's home jurisdiction.[19] Since the exceptions are case specific, the lawyer must use his judgment and the standard is basically the one of the "reasonable lawyer."

Comment 14 to MR 5.5 discusses various factors that would demonstrate a "reasonable relationship" between a matter involving the lawyer's practice and the temporary services to be provided in the out-of-state jurisdiction, as follows:

- The client has been represented by the lawyer, resides in or has substantial contacts with the jurisdiction in which the lawyer is admitted.
- The matter, although involving other jurisdictions, has a significant connection with the out-of-state jurisdiction.
- The significant aspects of the lawyer's work needs to be conducted in the out-of-state jurisdiction or a significant aspect of the matter involves the law of the out of state jurisdiction.
- The matter involves a multi-national corporation and the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each.
- The services needed require the lawyer's recognized expertise in matters gained from work performed for the clients that involves a body of federal, nationally uniform, foreign, or international law.

C. Annotations and Commentary

MR 5.5(a)

MR 5.5(a) provides that a "lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so."

The first prong of MR 5.5(a) states the obvious: a lawyer may not practice law in a jurisdiction if doing so is prohibited in that jurisdiction. Absent the application of the exceptions contained in MR 5.5 (see below), this section essentially restricts the practice of law to a lawyer who must be admitted to, and are members in good standing of, the bar of the jurisdiction in which they intend to practice. The stated rationale for limiting the practice of law to members of the bar of a particular state is to protect the public against the provision of legal services from "unqualified persons."[20] Lawyers who have demonstrated competence in the applicable state law—by passing the bar exam for one—may be deemed more qualified to represent clients in that jurisdiction than

[18] See discussion of local counsel below.

[19] See Comment 14. The same limitation is required in MR 5.5(c)(4).

[20] See Comment 2. It should be noted that a minority of states avoid testing on the specific laws of the state of its bar exam, among them New York.

those who have not done so. In addition, lawyers who are in good standing in the applicable jurisdiction are deemed to possess the requisite character and integrity to practice and are thus qualified to do so.

The second prong of MR 5.5(a) prohibits a lawyer from assisting another person in engaging in unauthorized practice. The term "another" could apply to a non-lawyer paralegal, law school graduate whose admission is pending, an out-of-state lawyer or a suspended or disbarred lawyer (all deemed "nonlawyers" for purposes of MR 5.5).[21] Delegation of law-related tasks to nonlawyers—generally, the primary way in which a lawyer may diligently and competently serve his client base—is not prohibited.[22] MR 5.5(a) has no expressed intent component, but good faith belief that a lawyer is complying with MR 5.5(a) is not a defense to liability.[23] As we discuss further below, immigration lawyers, like those in other practice areas who frequently use nonlawyer assistants, must be very careful that such nonlawyers do not engage in UPL. The key to delegation of law-related tasks to nonlawyers is adequate supervision, as required by MR 5.3.[24]

What Constitutes the Practice of Law for Purposes of MR 5.5?

Notwithstanding efforts by the ABA Task Force on the Model Definition of the Practice of Law to reach a consensus on the adoption of a universal definition of the practice of law in the Model Rules, the ABA ultimately resolved in 2003 that each state devise a definition of the practice of law which includes "the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity." [25] Further, the ABA resolved that:

> …Each jurisdiction should determine who may provide services that are included within the jurisdiction's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.

The ABA resolution recognized that the power to regulate the practice of law, which includes defining it, has historically rested with states and as a result definitions of the practice of law may vary. [26] In most cases the "practice of law" has been loosely defined by states because of the practical difficulty of drafting a comprehensive definition. [27] Maryland, for example, has a statutory definition of the practice of law that refers to commonly understood legal services such as providing legal advice and representation in a matter before a tribunal. However, the definition also includes the tautological phrase that the practice of law includes any "service the Court of Appeals defines as practicing law."[28] Maryland's definition obviously contemplates that what is deemed

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[21] Such individuals are also deemed nonlawyers for purposes of MR 5.3 which imposes supervisory obligations on lawyers who associate with or employ "nonlawyers" who provide law related services. As discussed in detail in EC 7, lawyers may be found to violate both MR 5.3 and MR 5.5 if the nonlawyer who is associated with or employed by a lawyer engages in the unauthorized practice of law as a result of the lawyer's failure to properly supervise the nonlawyer.

[22] See Comment 2. Providing information about the law to nonlawyers such as claims adjusters, bank employees, social workers, accountants, government employees and independent non-lawyers (who are otherwise permitted to provide law-related services) is also permissible.

[23] Good faith violation of a rule is often deemed a mitigating factor as to the appropriate sanction in disciplinary proceedings. See ABA Standard for Imposing Lawyer Sanctions, Section 9.32 (b) provides that "absence of a dishonest or selfish motive" is a mitigating factor.

[24] SEE EC on MR 5.3 at pp. 20-1. http://agora.aila.org/product/detail/1799.

[25]See Report of Task Force on The Model Definition of the Practice of Law Report to the House of Delegates, dated March 28, 2003. http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_328.authcheckdam.pdf.

[26] The ABA Task Force on the Model Definition of the practice of law has generated a state-by-state survey of the definitions of the practice of law which may be found at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.

[27] See, e.g., In re Unauthorized Practice of Law Rules proposed by S.C. Bar, 422 S.E.2d 123 (S.C. 1992) (court commended work of Bar subcommittee but rejected proposed definition opining that "it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules…[and that] the better course is to decide what is and what is not the unauthorized practice of law in the context of an actual case or controversy." The court went on to define certain activities as not constituting the practice of law.

[28] Maryland, Annotated Code of Maryland Business Occupations and Professions, Title. 10 Lawyers Subtitle 1 – Definitions General Provisions§ 10-101. Definitions, Sec. 10-101(h).

the practice of law may evolve. California has no statutory definition of the "practice of law " but under its case law, the practice of law has been deemed to include, as in Maryland, services provided in a lawsuit or similar proceeding and the giving of legal advice. However, California also includes in its definition "the preparation of documents that secure legal rights."[29]

Oregon's highest court has included the exercise of "professional judgment" based on legal principles as a component of the practice of law.[30]

Professional Judgment

The importance of considering the "professional judgment" component in determining whether conduct amounts to the practice of law was illustrated in a recent Second Circuit decision involving a contract lawyer who was hired to conduct a document review for a large law firm in connection with a federal multi-district litigation.[31] Whether or not the firm violated overtime provisions of federal labor law turned on the question of whether the contract lawyer's document review amounted to the practice of law. The Court agreed that the services the contract lawyer performed, as alleged in the complaint, did not require the exercise of any legal judgment whatsoever. There, the lawyer, who was closely supervised, did not select the documents to be reviewed, looked at the documents only to see if they contained certain pre-determined search terms, marked the documents into pre-determined categories including portions to be redacted based on protocols of the firm. Based on those facts, the court vacated the district court's determination that the lawyer's review amounted to the *per se* practice of law. The exercise of independent legal judgment is a key factor in determining whether an individual is practicing law within the meaning of MR 5.5 and other related rules.

Practice [of law] under Federal Immigration Rules

Although there is no formal definition of the phrase "practice of law" under federal immigration rules, the terms "practice," "preparation, constituting practice" and "representation" taken together provide the framework under which lawyers and other persons are deemed are authorized to appear on behalf of a foreign national. Immigration lawyers should be familiar with the definition of "practice" under 8 C.F.R. §1.2 as "the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with the DHS." "Preparation, constituting practice" is defined as "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed DHS forms, by one whose remuneration, if any, is nominal and who does not hold himself or herself out as qualified in legal matters or in immigration and naturalization procedure." "Representation" before DHS is defined as including "practice and preparation as defined in this section." [32] As discussed below, because MR 5.5(d)(2) permits a non-admitted lawyer to practice in a jurisdiction if federal law so permits, the federal rules which define what is essentially the practice of law are relevant.

Statutory Authorized Practice by Nonlawyers

As discussed, the State of Washington authorized the performance of certain activities by nonlawyers that fall within the definition of the practice of law under a "limited license" scenario. Other states such as Oregon, Illinois and California are in the process of developing similar programs.[33] New York has implemented a program to

[29] Birbrower, supra, 17 Cal.4th at 128 (citing People v. Merchants Protective Corp. (1922) 189 Cal. 531, 535, 209 P. 363.

[30] See State Bar v. Smith, 942 P.2d 793 (Or. 1997)(upholding injunction against nonlawyer document preparation service which also provided legal advice upon which customers relied, court defined practice of law defined as "the exercise of professional judgment in applying legal principles to address another person's individualized needs through analysis, advice and other assistance"); see also North Carolina Formal Ethics Op. 12 (2007)("inherent in the definition of 'practice of law' in North Carolina is the exercise of at least a modicum of independent legal judgment.").

[31] See Lola v. Skadden, Arps, Slate,Meagher & Flon, 14-3845, WL 4476828 (2d Cir. July 23, 2015)

[32] See also 8 C.F.R. §§ 1001.1(i),(j) and (k).

[33]The California State Bar Civil Justice Strategies Task Force Report is available at

permit nonlawyers, who have undergone specific training to assist individuals in landlord-tenant and consumer debt cases.[34] Whether or not the services performed by nonlawyers under these special programs technically amount to the practice of law for purposes of MR 5.5 has yet to be determined.

It should be noted that "limited license" designations would have no per se impact on the question of who may lawfully provide representation of non-citizens in immigration proceedings before the Executive Office of Immigration Review immigration courts and the Board of Immigration Appeals or before the Department of Homeland Security, or both.[35]

A more detailed discussion of the "limited license" scenario is beyond the scope of this EC.

Suspended or Disbarred Lawyers

Disbarred and suspended lawyers, and even those on inactive status in their state of admission, are deemed nonlawyers for purposes of MR 5.5 and are prohibited from practicing law under MR 5.5(a).[36] The prohibition applies also to lawyers who are under administrative suspensions only for failure to register and pay fees. [37] Since MR 5.5(a) also prohibits assisting unauthorized practice, as we discuss further below, lawyers should exercise extreme caution in employing or using the services of suspended or disbarred lawyers in their practice, even if they are employed as paralegals.[38] Some states have specific rules on employment of disbarred or suspended lawyers. See South Carolina Disciplinary Rules.

In the immigration context, lawyers who have been suspended or disbarred in their home states may not practice immigration law because only lawyers in good standing in their state(s) of admission are authorized to represent foreign nationals in immigrations matters. This is irrespective of whether the Executive Office for Immigration Review (EOIR) issues a reciprocal order of suspension or disbarment, since, as discussed, lawyers are required to demonstrate good standing in the applicable notice of appearance.

One New York lawyer who had been suspended for three years for various disciplinary violations, including dishonesty, was ultimately disbarred for attempting to avoid the consequences of his state suspension by practicing immigration law in California. During the period in which he practiced immigration law, the suspended lawyer had never sought reinstatement in New York but falsely represented to the Immigration Court that he was

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http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000013042.pdf.

The Oregon State Bar Legal Technicians Task Force Report is available at http://bog11.homestead.com/LegalTechTF/Jan2015/Report_22Jan2015.pdf.

[34] See New York Court Navigator Program at http://www.courts.state.ny.us/courts/nyc/housing/rap.shtml

[35] Pursuant to 8 CFR 292.1(a), only the following are permitted to provide representation in immigration proceedings:

- Attorneys in the United States
- Law Students and law graduates (supervised)
- Unpaid reputable individuals
- Accredited representatives (non-profit)
- Accredited officials (foreign government)
- Attorneys outside the U.S.: Provided that he/she represents persons only in matters outside the geographical confines of the United States and that the official before whom he/she wishes to appear allows such representation as a matter of discretion.

Non-lawyers including those who may qualify for a "limited license" under applicable state law would still need to comply with federal rules applicable to immigration matters which require "accreditation" Further information is available at http://www.justice.gov/eoir/recognition-and-accreditation-program.

[36] In re Cohen, 612 S.E.2d 294 (Ga. 2005)(lawyer on inactive status representing criminal defendant deemed to have engaged in UPL); In re Schoeneman, 891 A.2d 279 (D.C. 2006)(Neb. lawyer engaged in UPL by counseling clients and drafting pleadings while suspended)

[37] In re Holmberg, 135 P.3d 1196 (Kan. 2006)(lawyer, who had been suspended for failure to pay registration fees, violated Rule 5.5(a) by continuing to represent clients); Hipwell v. Kentucky Bar Ass'n, 267 S.w.3d 682 (Ky. 2008)(continuing to work as in-house counsel for 22 years after being suspended for non-payment dues, even though lawyer claimed he didn't know his work amounted to practice of law)

[38] See discussion as pp, 1-8.

in good standing.[39] Other suspended immigration lawyers may attempt to continue to practice law through the use of alternative business relationships or businesses, but they also cannot avoid the reach of MR 5.5.[40]

Enforcement and Sanctions for UPL

In the normal course, a state disciplinary authority may discipline a lawyer by imposing, among other penalties, the sanction of suspension or disbarment from the practice of law in that state. However, when a lawyer violates MR 5.5 by practicing unlawfully in an out-of- state jurisdiction, the out-of-state disciplinary authority that has jurisdiction over the same lawyer does not have those options. If a lawyer is not admitted to practice in a particular state in the first instance, he cannot be suspended or disbarred. Accordingly, sanctions imposed by an out-of-state disciplinary authority have been limited to injunctive relief – such as prohibiting pro hac vice status or other legal services in that state for a specific time period (or indefinitely) and a fine.[41] Engaging in the unauthorized practice of law may also subject the non-admitted lawyer (including suspended or disbarred lawyers) to criminal prosecution.[42] Immigration lawyers who are found by a state disciplinary authority to have engaged in the unauthorized practice of law and are suspended or disbarred would be subject to similar discipline by the EOIR as well.[43]

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[39] In re Harris, 25 A.D. 3d 209 (N.Y. App. Div. 1st Dept. 2005)((lawyer admitted in affidavit of disciplinary resignation that he falsely represented to Immigration Court that he was in good standing; in representations to the New York disciplinary authorities the lawyer claimed he believed he was authorized to practice after the expiration of the three year suspension)[get EOIR disbarment as well]

[40] See, e.g., Maryland Atty. Grievance Comm'n v. Brisbon, Misc. Docket N0. 28 (October 26, 2011)(suspended immigration lawyer who opened an office as an "immigration consultant" at the same address as her law office, selected and assisted clients in filling out immigration forms which she filed, and agreed to accompany clients to their initial interview engaged in the unauthorized practice of law, despite identification as "immigration consultant" in signage outside office); In re Soininen, Bar Docket 212-01&272-01, (Wash. D.C. 2003)(immigration lawyer who had been suspended for DWI convictions engaged in UPL by representing clients in Immigration Court as employee of a for profit immigration services provider; although incorrectly advised by her lawyer that she did not have to be a member in good standing to practice, she nevertheless filed notice of appearance forms with the EOIR in which she falsely represented her status as a suspended lawyer); In re Miller 238 P.3d 227 (Kan. 2010)(suspended lawyer engaged in UPL by maintaining financial control over workers compensation law firm, a professional corporation, and hiring another lawyer to handle client matters as an "independent contractor" and misrepresenting his own status in written communications on firm letterhead).

[41]Disciplinary Board v. Carpenter, No. 09-1343 (Iowa 2010)(immigration lawyer, admitted only in Minnesota, who practiced before immigration Court in Iowa under Rule 5.5(d) and on disability suspension in Iowa, and engaged in numerous acts of professional misconduct prior to the state suspension, ordered "to cease and desist from all legal practice in Iowa indefinitely with no possibility that the order will be lifted for a period of not less than two years") Off. of Disc. Counsel v. Schwartz, No. 2130 DD 3, No. 204 DB 2014 (Pa. Jan. 28, 2015)(imposed reciprocal discipline based on injunctions against practice for three years imposed by Louisiana disciplinary decision, where Pa. lawyer who had never been admitted in Louisiana engaged in UPL in that state when he appeared "of counsel" to local law firm without obtaining pro hac vice status as he knew he was required to do); In re Jackman, 761 A.2d 1103, 1107 (N.J. 2000)(associate of l law firm licensed only in Massachusetts who engaged in UPL in transactional matters when he "interviewed and counseled clients, prepared and signed documents to or on behalf of clients, and negotiated with lawyers on the merger and acquisition matters he handled" for over seven years, but who did so upon advice and approval of superiors, was subject to postponement of admission to the New Jersey bar for one year).

[42] For example, in California the unauthorized practice of law is a misdemeanor under Business and Professions Code §6126 which provides that:

> (a) Any person advertising or holding himself or herself out as practicing or entitled to practice law or otherwise practicing law who is not an active member of the State Bar, or otherwise authorized pursuant to statute or court rule to practice law in this state at the time of doing so, is guilty of a misdemeanor punishable by up to one year in a county jail or by a fine of up to one thousand Dollars ($1,000), or by both that fine and imprisonment.

[43] See discussion of reciprocal discipline in compendium chapter MR 3.3.

How Does a Lawyer Assist UPL?

Lack of Adequate Supervision

One of the common ways in which a lawyer may assist another in engaging in the unauthorized practice of law is through inadequate supervision of non-lawyer employees.[44] Inadequate supervision of non-lawyers occurs in most cases when lawyers delegate too much authority to non-lawyer assistants especially in high volume practices.[45] Lawyers may also run the risk of assisting UPL by working with or hiring out-of-state lawyers [46] or out-sourcing legal services.[47] The problems for immigration lawyers who rely on legal assistants with a wide range of experience and ability are discussed in the compendium chapter of MR 5.3.

Improper Association with Nonlawyers

Immigration lawyers who improperly associate with non-lawyers who provide immigration services may be found to violate MR 5.5(a). For example, a Connecticut lawyer was found to have violated Rule 5.5(a) by serving as an "agent" for service for a non-lawyer owned entity entitled "Immigrant's Services." The lawyer shared office space and a fax number with the entity. His name appeared on the office door and in an advertisement in the local newspaper indicating, "[w]e are a team to help you." The actual services were provided by the non-lawyer allegedly on a sub-contracting basis.[48] The lawyer was reprimanded.

Immigration lawyers who associate with online immigration service providers may also run the risk of assisting UPL. Some immigration lawyers, for example, may consider entering into business relationships with document preparation services that retain the clients and prepare immigration forms for review by the lawyer. In such arrangements the lawyer may be paid a salary or a percentage of the fees paid to the entity, but would not meet with or communicate directly with the entity's customers. Any immigration lawyer contemplating such an arrangement would at a minimum need to evaluate the types of services the entity will provide to its clients and relevant legal authorities that define what it means to engage in the practice of law. If the nonlawyer entity is engaged in the unauthorized practice of law, the lawyer's involvement in the contemplated relationship would likely violate Rule 5.5(a) and (b), as well as MR 5.4 (sharing fees with nonlawyer).[49]

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[44] See e.g., Va. Ethics Op. 1792 (2006) (lawyer cannot rely on non-lawyer social workers to assist pro se clients in filing small claims actions that goes beyond simple translation, transcription or filing instructions; —essentially such non-lawyers may function solely as scriveners); For a discussion of problems and practices in supervision of non-lawyers, see Paul R. Tremblay, Shadow Lawyering: Non-lawyer Practice within Law Firms; Indiana Law Journal 653 (Spring 2010), and EC MR 5.3.

[45] See, e.g., Cincinnati Bar Ass'n v. Mullamey, 894 NE2d 1210 (Ohio 2008) (high volume foreclosure cases) and discussion and cases cited in MR 5.3.

[46] See, e.g. In re Lerner, 197 P.3d 1067 (Nev. 2008) (law firm improperly allowed lawyer employee licensed only in Arizona to engage in activities amounting to the practice of Nevada law on a continuing basis out of Arizona office; activities included conducting initial consultations, deciding whether to accept representation, negotiating claims, and serving as the client's sole contact with the firm)

[47] See e.g. Fla. Ethics Op. 07-2 (lawyer may outsource to paralegals and foreign lawyers as long as there is proper supervision); LA County Ethics Op. 518 (2006)(out of state legal research and brief writing ok as long as lawyer is responsible for final product); San Diego Ethics Op. 2007-1(outsourcing in India OK); NY ethics Op. 2006-3 (outsourcing supervision must be rigorous) Illinois Ethics Op. 06-02 (law firm aids in the unauthorized practice of law if it permits marketing firm to screen potential client responses to advertising and to forward only "promising" responses to the law firm).

[48] See Statewide Grievance Reprimand, Joseph Charles Coco, Nos. 09-0857 and 09-0858 (March 11, 2011); In re Lefkowitz, 47 A.D.3d 326 (N.Y. App. 1st Dept. 2007) (lawyer aided UPL by representing immigration clients at hearings and interviews as employee of nonlawyer entity that prepared immigration applications involving legal analysis).

[49] As discussed in New York City Bar Opinion 2014-1, a lawyer's business arrangement with a non-lawyer business entity, like the one above, may raise many other ethical issues such as the question of who is the lawyer's client and which state's professional responsibility rules apply (MR 8.5), multijurisdictional practice (MR 5.5 (c), federal practice (MR 5.5(d), multi-disciplinary practice (MR 5.8), and other basic rules such as competence (MR 1.1), limited scope representation (MR 1.2(c)), MR 1.4 and 1.2(a)communication and consulting with client, excessive fees (MR 1.5), confidentiality (MR 1.6), personal conflict of interest (MR 1.7(a) and compensation from one other than client (MR 1.8(f)).

Hiring Suspended or Disbarred Lawyers

Immigration lawyers who hire suspended or disbarred lawyers may be subject to a charge of assisting UPL if they do not properly supervise them and fail to ensure that the public is aware that the suspended or disbarred lawyers are not authorized to practice.[50] As reflected in a Nebraska bar opinion, non-profit immigration services providers are advised that hiring a suspended or disbarred lawyer as a paralegal, though permissible, presents the risk that the public may be led to believe that the suspended or disbarred lawyer is authorized to provide legal advice, draft papers or provide other services short of appearing in court without supervision.[51] Because of the problems associated with hiring disbarred or suspended lawyers, some states impose specific restrictions on hiring them separate and apart from the restrictions imposed on suspended or disbarred lawyers. [52]*For that reason, immigration lawyers should check the applicable state regulations regarding employment of suspended or disbarred lawyers.*

Lawyers may unwittingly assist unauthorized immigration practice by working for – not hiring – a suspended or disbarred lawyer. A lawyer with no experience in immigration law was found to have aided UPL by agreeing to do per diem work for a suspended immigration lawyer by, in essence, "fronting" for him. The lawyer made court appearances for the suspended lawyer's clients, based on the suspended lawyer's instructions just prior to the hearings, and signed applicable immigration papers which had been prepared by the suspended lawyer. To make matters worse, he made an intentional misrepresentation to the disciplinary authorities in an answer to a complaint that was prepared by the suspended lawyer on his behalf. Even, as in this case, where the lawyer did not realize that he was assisting unauthorized practice, was motivated by a desire to help out the suspended lawyer who was under financial strain and presented other evidence in mitigation, he was suspended for one year.[53]

MR 5.5(b)

MR 5.5(b) provides that **"**a lawyer who is not admitted to practice in this jurisdiction shall not:"

MR 5.5(b)(1)

MR 5.5(b)(1): except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law."

While MR 5.5(a) stands for the basic principle that a lawyer must be authorized to practice, MR 5.5(b) addresses two indicators of unauthorized practice by a non-admitted lawyer. Under sub-section (b)(1), if a lawyer is not admitted in a jurisdiction, she may not maintain an office or other continuous presence for practice of law in

[50] In re Discipio, 645 N.E. 2d 906, 911 (Ill. 1994) (lawyer aided UPL by permitting disbarred lawyer to continue providing legal services, short of filing notice of appearance, in workers compensation cases which "required legal knowledge and skill in order to apply legal principles and precedent," services included locating and interviewing clients, performing initial interview of the clients, continuing to gather pertinent information from clients, ensuring that clients signed appropriate documents, including retainer agreement, and receiving half of legal fee).

[51] See e.g. Nebraska Ethics Advisory Opinion No. 11-01 (2011) ("…while the rules allow the suspended lawyer to serve in a paralegal capacity, the level of scrutiny of [his] activities will necessarily be higher, particularly when [as here] the actual order of suspension…requires the suspended lawyer to prove, among other things, that he has not practiced law during the period of suspension.") Philadelphia Bar Advisory Ethics Op. 2012-3 (August 2012)(under Pa. 217 of Pa. Rules of disciplinary enforcement, suspended lawyer may not be employed by lawyer or non-lawyer organization to act as "non-attorney advocate" in social security matters)

[52] See e.g., Colorado's Rule 5.5 which provides that a lawyer may only "employ, associate professionally with, allow or aid a disbarred or suspended attorney" to perform research, drafting or clerical activities subject to certain limitations described in the Rule; Pennsylvania Rule 217(j) of the Pennsylvania Rules of Lawyer Disciplinary Enforcement, which articulates activities that a disbarred or suspended lawyer may or may not perform and holds supervisory lawyer strictly liable for the disbarred or suspended lawyer's failure to comply with the rule; Wyoming 's version of Rule 8.4 (g) that prohibits a lawyer from employing a disbarred or suspended lawyer to perform services that are in any way related to the practice of law as defined by Wyoming law; see also In re Anonymous, 787 N.E.2d 883 (Ind. 2003)("it is impermissible for an Indiana attorney to employ a suspended or disbarred attorney to perform work of any kind in a law office."); Philadelphia Bar Ethics Op. 2005-10(July 2005)(under Pa. Rule 217 of Pa. Rules of Disciplinary Enforcement, suspended lawyer may engage in certain law related activities only under direct supervision of admitted lawyer who shall be responsible for ensuring that suspended lawyer complies with restrictions, which include filing of a notice of employment and termination with appropriate authorities).

[53] Matter of Thalasinos 2014 NY Slip Op 01680 (App. Div. 1st 2014).

that jurisdiction. Maintaining a law office in a particular jurisdiction would ordinarily lead a member of the public to believe that the lawyer is authorized to offer and provide legal services to clients in that jurisdiction, when in fact he is not.[54] A lawyer may violate MR 5.5(b) even if he does not maintain a physical office. This is so because a "continuous and systematic presence" for the practice of law may be established through the use of telephones, faxes, computers or other technological means which amount to a "virtual" office.[55] In the California case that is acknowledged to be the driving force for the ABA 2002 amendments to MR 5.5 permitting multi-jurisdictional practice, the court discussed the factors to be considered in determining what constitutes a lawyer's "presence" in a state in which he is not admitted:

Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated [the applicable rule providing that only lawyers admitted in California may practice law in California], but it is by no means exclusive. For example, one may practice law in the state in violation of [the rule] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means.[56]

MR 5.5(b)(2)

MR 5.5(b)(2): hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

MR 5.5(b)(2) addresses another indicator that a lawyer is engaging in the unauthorized practice of law by holding out that the lawyer is authorized to practice law in a jurisdiction.[57] For example, advertising that fails to disclose that the lawyer is not admitted in the jurisdiction or otherwise clarify that there are jurisdictional limitations to his ability to practice law in the jurisdiction amounts to holding oneself out as admitted, even if there is no evidence that the lawyer engaged in actual practice.[58] Multistate firms, in particular, must be careful when advertising in a state in which no partners are admitted.[59]

As we discuss below in Special Areas of Concern, immigration lawyers who are allowed to maintain offices

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[54] See e.g., Maine Ethics Op. 198 (2005)(lawyer who maintains office and website holding himself out as being able to provide legal services in Maine when he is not admitted engages in UPL).

[55] See Comment 4. [4] "Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction. See also Rules 7.1(a) and 7.5(b)."

[56] In Re Birbrower v. Superior Court, 949 P2d 1 (Cal. 1998) (telephone, fax, computer or other technological means can amount to continuous presence in determining what constitutes unauthorized practice.); In re Towne, 929 A2d 774(Del 2007)(physical presence not required to establish continuous presence).

[57] So-called document preparation services or other nonlawyers have also been held to have engaged in UPL by virtue of advertising or the holding out in some other manner that they are licensed to provide legal advice or other services amounting to the practice of law. See e.g., Florida Bar v. Catarcio, 709 So. 2d 96 (Fla. 1998) (law graduate, not admitted in Florida, engaged in unauthorized practice of law by holding himself out as being capable of providing bankruptcy legal services in print advertising and business cards -- which used designation "J.D" after his name and showed a drawing of scales of justice --- and by offering "free consultations."); Statewide Grievance Committee v. Harris, (Conn. 1996)(advertising that nonlawyer would prepare legal documents for signing by clients in uncontested divorce cases deemed practice of law).

[58] Gerber v. Disc. Bd. of N.D. Supreme Ct, No. 20150032 (August 25, 2015)(non-admitted lawyer engaged in UPL when his law firm identified him as "staff attorney" and lawyer used that title in listing work history in bar admission application; court rejected argument that violation required actual practice of law noting that news release contained no disclaimers alerting public that lawyer was not licensed in N.D.) Attorney Grievance Comm. v. Harris-Smith, 737A.2d 567 (MD 1999)(lawyer admitted in federal court, but not Maryland, improperly used radio and newspaper ads to target prospective bankruptcy clients in Maryland without disclosing that he was not admitted in Maryland); Statewide Grievance Comm. v. Zadora, 772 A.2d 681 (Conn. App. Ct. 2001)(advertisements alone may be deemed UPL, even with disclaimers).

[59] Oregon Ethics Op. 2005-103 (2005)(revised 2015)(multistate firm may advertise to Oregon clients the availability of firm lawyers not admitted in Oregon, but must make clear that non-Oregon lawyers would be available to render legal services only as allowed by 5.5 (c)and (d); So. Carolina Ethics Op. 05-12 (2005) (lawyer may enter arrangement with out of state law firm that handles marketing, initial client contact and information-gathering, under lawyer's supervision, where out of state firm generates documents and forwards to lawyer for approval, signature, and filing, as long as out of state firm discloses in all of its advertising that it is not licensed to practice law in South Carolina, and all advertising and forms include the name of the South Carolina admitted lawyer who acts in supervisory capacity).

in out-of-state jurisdictions for the practice of immigration law under MR 5.5(d) must be careful when advertising in those jurisdictions to avoid the impression that they are authorized to practice state law in those jurisdictions.

MR 5.5(c)

MR 5.5(c) states that a lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that are:

Consistent with what is commonly referred to as "multi-jurisdictional practice", MR 5.5(c) delineates at least four exceptions to the prohibition against UPL in MR 5.5(a) and (b). Notably, the exceptions in (c) apply only to non-admitted U.S. lawyers, as opposed to non-U.S. lawyers (those admitted in foreign countries). [60] Unlike MR 5.5(a) and (b), which prohibits a lawyer from practicing law on a permanent basis (i.e., continuous and systematic) in a jurisdiction in which the lawyer is not admitted, MR 5.5(c) permits out-of-jurisdiction practice if the services are provided on a *temporary* basis and under limited circumstances. Those limited circumstances reduce the risk that members of the public may be represented by unqualified lawyers. The public is further protected where, as in the case of the admitted lawyer, a non-admitted lawyer practicing under one of the exceptions in MR 5.5(c) is subject to the disciplinary authority of the state in question.[61]

The exceptions are not meant to be exhaustive in part because as worded they are open to interpretation.[62] The first exception concerns engagement of local counsel. The second and third exceptions concern matters to be resolved by a tribunal or through alternate dispute resolution, respectively. The fourth exception applies to transactional matters. Lawyers seeking to practice on a temporary basis should check the applicable state's Rule 5.5, as well as any other statute or rule. In some instances, a state may impose additional limitations on temporary practice. [63] See State Summary of State Variations, herein. In addition, as reflected in Comment 20 , lawyers practicing under the temporary practice exceptions in MR 5.5(c) should takes steps to ensure that their clients understand the jurisdictional limitations of their practice as part of the requirement of adequate communication under MR 1.4(b), and in compliance with the applicable rules concerning advertising.[64] As always, but especially where a lawyer is practicing outside of her own jurisdiction, the lawyer must be able to provide competent representation as required by MR 1.1.[65] This would include becoming familiar with the substantive and procedural law of the jurisdiction.

MR 5.5(c)(1)

MR 5.5(c)(1): are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and

[60] While MR 5.5(c) does not apply to temporary practice by lawyers admitted out of the country, in 2002 the ABA adopted a special rule for temporary practice by foreign lawyers which closely follows the exceptions provided in MR 5.5(c) as to non-admitted U.S. lawyers. While we do not discuss the special rules for foreign lawyers further, immigration lawyers should be mindful of the limitations imposed on foreign lawyers who may wish to associate with U.S. admitted immigration lawyers. Lawyers are advised to check the applicable state versions of MR 5.5 and other regulations as they relate to temporary practice by foreign lawyers. See Summary of State Variations below. ABA Model Rules for Temporary Practice by Foreign Lawyer at http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/201j.authcheckdam.pdf.

[61] See Comment 19 to MR 5.5; see also York v. W. Va. Off. of Disc. Counsel and Disc. Bd. No. 12-1410 (W.Va. June 5, 2013)((West Virginia has disciplinary jurisdiction over out-of-state lawyer even though state has not yet enacted the multijurisdictional practice provisions of Model Rules and state rule governing unauthorized practice is not preempted by federal law).

[62] Comment 5 states that the "fact that conduct [listed as exceptions in MR 5.5(c)]is not so identified does not imply that the conduct is or is not authorized."

[63] See, e.g., Nevada Bar Opinion 43 (October 27, 2011) (non-admitted lawyer who engages in temporary practice under any of the exceptions to Nevada's analogous temporary practice rule, must file an annual report, among other things, outlining services provided)

[64] Comment 21 advises that MR 5.5 (c) and (d) "do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5"); Comment 20 advises that in some cases "a lawyer who practices law in [a] jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b)."

[65] See ECs on Competence, MR 1.1 and Diligence, MR 1.3.

who actively participates in the matter.

As discussed, one way in which a non-admitted lawyer may be able to practice law in an out-of-state jurisdiction is in "association with" an admitted lawyer. This is not a new concept. In order to preserve the client's interest in counsel of her choice, non-admitted lawyers have traditionally been permitted to use "local counsel" to provide assistance and support in a matter within the local counsel's jurisdiction. However, under MR 5.5(c)(1) the local counsel must actively participate in and share responsibility for the matter. Local counsel cannot be a mere conduit for the non-admitted lawyer's work.[66] Because some local counsel may try to avoid such responsibility by limiting the scope of their work, the conscientious non-admitted lawyer should consider memorializing the nature and scope of services to be provided by local counsel so that it conforms to MR 5.5(c)(1).[67] Any agreement between the local counsel and non-admitted counsel will of course need to comply any local procedural rules regarding local counsel or pro hac vice admission.[68]

An immigration lawyer generally would have no need for local counsel unless, as discussed, the immigration lawyer has agreed to represent a client in a matter based on state law in an out-of-state jurisdiction. In such situations, the fact that the lawyer is otherwise authorized to practice immigration law or maintain an office for the practice of immigration law in the out-of-state jurisdiction would be of no significance under MR 5.5(c)(1).[69] An immigration lawyer also may need to engage "local" counsel if she were handling a petition for review in a circuit court of appeals in which the lawyer had not been admitted or a matter that involved the consequences of a criminal conviction or final decree to an immigration client. In such situations, the immigration lawyer would have to engage counsel admitted in the particular circuit court of appeals to act as local counsel who, in accordance with MR 5.5(c)(1) would have to participate in the matter and share responsibility.[70] An "of counsel"

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[66] ABA Report to House of Delegates , No. 201B (August 2002) at 3-4 (in proposed rule 5.5(c)(1), committee reasoned that by requiring local counsel to participate meaningfully in a matter:

> the state's regulatory interest in protecting the interests of both clients and the public is adequately met. The lawyer who is licensed in the jurisdiction will have an opportunity to oversee the out-of-state lawyer's work and to assure that the work is performed competently and ethically. The local lawyer, having been found to have the requisite fitness and character to practice law in the state, is presumptively qualified to carry out this responsibility.

[67] See NY City Bar Op. 2015-4 (discussing extent to which local counsel may limit the scope of representation under Rule 1.2 (c), concludes that local counsel cannot exclude ethical duty to avoid filing frivolous claims) see also Dean R. Dietrich, Ethics: Determining Responsibility of Local Counsel, Wisconsin Lawyer Vol. 84, No. 4 (April 2011) (recommending in order to avoid joint responsibility that local counsel should have clear agreement as to parameters of responsibility).

[68] In many instances local counsel are required to perform substantive services under local rules. For instance, Alaska R. Civ. P. 81(a)(3) states that "local counsel shall be primarily responsible to the court for the conduct of all stages of the proceedings, and their authority shall be superior to that of attorneys permitted to appear [pro hac vice]." New Jersey's rule 1:21-2(c)(4) concerning pro hac vice admission requires that papers filed with the court be signed by an attorney of record authorized to practice in [New Jersey] who will be responsible for them and for the actions of the pro hac vice lawyer. See, e.g., Ingemi v. Pelino & Lentz, 866 F. Supp. 156, 162 (D.N.J. 1994)(court held that by virtue of submitting the pro hac vice application, local counsel was responsible for the non-admitted lawyer's "conduct of the cause.") Federal court rules or case law may also impose special requirements on local counsel. See e.g. n, 2011 WL 34339663 (E.D. La. Aug. 8, 2011)("the 'professional status' of 'virtual messenger boy'…does not exist for members of the bar who serve as counsel of record for a client…) all counsel [have] a professional duty to the client…) Is there a case name omitted from this last cite?

[69] Complying with the various components of MR 5.5 (c) often requires walking a fine line. While clearly an immigration lawyer could not represent a client in a criminal matter under the state's penal code in a jurisdiction in which the lawyer was not admitted, without associating with local counsel or obtaining pro hac vice admission, an immigration lawyer may need to analyze a state criminal statute when a client is charged with a federal deportable offense based on a criminal conviction under the state's penal code. The same applies to analyzing the validity of a marriage or adoption in a state, in which the lawyer is not admitted, with reference to asserting a benefit under federal immigration law.

On the other hand, there may be circumstances in which the client is seeking legal advice about complying with an out-of-state law prospectively, such as the question of whether state law requires the client to comply with federal law as to E-verify, the failure of which could result in state sanctions, teaming up with local counsel would be prudent.

[70] As an alternative, a non-admitted lawyer also may seek pro hac vice admission in the Circuit Court of Appeals, which may be easier.

relationship with an admitted lawyer without more would not satisfy MR 5.5(c)(1).[71]

The prudent and conscientious immigration lawyer should always check the applicable jurisdiction's rules for pro hac vice admission, since the procedures are often pro forma and benefits the lawyer by reducing the risk of a violation of MR 5.5. Pro hac vice admission should generally be sought unless deemed clearly unnecessary.

MR 5.5(c)(2)

MR 5.5(c)(2): lawyer practice in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.

MR 5.5(c)(2) covers two basic scenarios—appearances by non-admitted lawyers in pending litigation and potentially pending litigation. As to pending matters, the rule permits a non-admitted lawyer to provide temporary legal services *in* the pending matter or legal services that are *reasonably relate*d to the pending matter before a tribunal in the out-of-state jurisdiction if the lawyer is authorized to appear— or reasonably expects to appear—before the tribunal. This essentially means that if a lawyer has been admitted pro hac vice or reasonably expects to be so admitted in the pending matter, he could provide legal services on a temporary basis. [72] Services deemed to be reasonably related to a pending matter would include meeting with a client, interviewing potential witnesses, document reviews and taking of depositions.[73] This sub-section provides the non-admitted lawyer with greater flexibility in providing temporary legal services without pro hac vice admission in the pending matter as long as his expected admission is reasonable. Lawyers who have been admitted pro hac vice or reasonably expect to be admitted may associate with non-admitted subordinate lawyers to conduct research, review documents and attend meetings in support of the lawyer responsible for the litigation.[74]

As to potentially pending matters, the same conditions apply. Non-admitted lawyers may provide temporary legal services in a matter that potentially will require resolution before a tribunal or administrative agency. The only difference is a practical one in that a lawyer generally would not be able to seek pro hac vice admission to a tribunal or agency for a matter that is not currently before that tribunal or agency.

Generally, an immigration lawyer need only be concerned about MR 5.5(c)(2) if he were representing a client in a matter being heard in an out-of-state jurisdiction involving the law of that jurisdiction. [75]As in the case of MR 5.5(c)(1), an immigration lawyer would have to be mindful of MR 5.5(c)(2), if she were handling a petition for review in a circuit court of appeals in which she was not admitted. In order to comply with MR 5.5(c)(2), the immigration lawyer would either have to be admitted pro hac vice or reasonably expect to be admitted pro hac vice before the court.

MR 5.5(c)(3)

MR 5.5(c)(3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which

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[71] Off. of Disc. Counsel v. Schwartz, No. 2130 DD 3, No. 204 DB 2014 (Pa. Jan. 28, 2015)(based on reciprocal discipline of a Louisiana disciplinary decision, court found that Pa. lawyer who had never been admitted in Louisiana engaged in UPL where he appeared "of counsel" to local law firm without obtaining pro hac vice status as he knew he was required to do; because lawyer not admitted in Louisiana, Louisiana sanction imposed was injunctive relief barring lawyer from seeking full admission, pro hac vice admission or in-house counsel admission for three years)

[72] As discussed in Comment 9, if the tribunal (or administrative agency) requires non-admitted lawyers to obtain formal admission pro hac vice before appearing before the tribunal or administrative agency, the lawyer would have to do so in order to comply with MR 5.5 as well.

[73] See Comment 10.

[74] See Comment 11. Presumably subordinate non-admitted lawyers who perform such tasks would be permitted to do so, irrespective of whether they are admitted since they would be under the supervision of the lawyer acting under the exception and who would bear full responsibility for those activities under MR 5.3, relating to supervision of nonlawyers., or MR 5.1, relating to supervision of lawyers.

[75] Immigration lawyers who may need to handle a mandamus or habeas corpus action in a federal jurisdiction in which the lawyer is not admitted would need to either associate with local counsel or seek pro hac vice admission.

the forum requires pro hac vice admission.

Under MR 5.5(c)(3), a non-admitted lawyer may provide temporary legal services in a mediation or arbitration on a matter that arises out of the lawyer's practice in his home jurisdiction and pro hac vice admission is not otherwise required.[76] When an arbitration or mediation is court ordered, the non-admitted lawyer would have to be admitted pro hac vice.[77] MR 5.5(c)(3) is similar to MR 5.5(c)(2) in that it applies to both pending and potential matters.

Unless an immigration lawyer is handling an out-of-state matter that requires arbitration, he need not be concerned about compliance with this sub-section. As is true of all the exceptions in MR 5.5(c) they are triggered only when an immigration lawyer is called upon to handle a matter, other than immigration law, in a jurisdiction in which he is not admitted.

MR 5.5(c)(4)

MR 5.5(c)(4): law practice not within paragraphs (c)(2) or (c)(3) and that arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

MR 5.5(c)(4) applies to legal matters that are not covered in MR 5.5(c)(2)(relating to matters before a tribunal) or MR 5.5(3)(relating to matters involving alternate dispute resolution, such as arbitrations or mediations). MR 5.5(c)(4) relates mainly to lawyer's participation in contractual or other transactional matters. The exception includes both legal services and services that non-lawyers may perform but that are considered the practice of law when done by a lawyer.[78]

MR 5.5(c)(4) requires that whatever legal services are provided under this more general exception be "reasonably related" to the matter in the state in which the lawyer is admitted. As noted in Comment 14, whether certain legal services are "reasonably related" to a client matter depends on a variety of factors, such as whether the client may have been previously represented by the non-admitted lawyer, the client has substantial contacts in the jurisdiction in which the lawyer is admitted or the matter has significant connection to that jurisdiction. The only specific example of a "reasonably related" matter provided in Comment 14 is a non-admitted lawyer providing assistance to a multinational corporation searching for potential business sites outside of the lawyer's home jurisdiction.[79] The Comment also refers generally to circumstances in which important aspects of the matter in the lawyer's home state may involve the law of the out-of-state jurisdiction or draw on the lawyer's recognized expertise involving a particular body of federal, nationally-uniform, foreign, or international law.

The comments do not elaborate further with respect to what services are deemed "reasonably related," but sound guidance may be found in a well-thought out Ohio Bar Ethics opinion.[80] There, an out-of-state lawyer, associated with a "national law firm," offered debt-settlement services to Ohio residents who would have located the firm through its website. The services included investigation, negotiation and other non-litigation activities. After determining that the first three exceptions in Rule 5.5(c) permitting temporary practice did not apply, the opinion addresses the questions of whether the factual scenario was sufficient to establish that the non-litigation services arose out of or were reasonably related to the lawyer's home state as required by Rule 5.5(c)(4), the fourth exception. In that regard, the opinion noted that the Ohio clients' credit problems were not connected to the lawyer's practice in the jurisdiction of his admission. They also observed that there was no preexisting relationship

[76] Phila. Ethics Op.2003-13 (2003)(lawyer not admitted in Pa. but admitted elsewhere may represent longtime client in single ADR matter under MR 5.3(c)(3); In re Little Compton, 37 A.3d 85 (R.I. 2012 (noting that court rules in Connecticut, Utah and Washington "explicitly permit nonlawyers to participate in labor arbitrations without determining if [the] act constitutes the practice of law, citing different jurisdictional positions on the subject).

[77] Comment 12 to MR 5.5(c)(3).

[78] Comment 13.

[79] This example is provided in Restatement (Third) of The Law Governing Lawyers Section3 comment e (2001). There the out-of-state lawyer would be asked to assist with the selection of the location by negotiating with local officials on zoning, taxation and environmental matters.

[80] See Ohio Ethics Opinion 2011-2 (October 7, 2011).

between the Ohio clients and the out-of-state lawyer. Lastly, they determined that the out-of-state lawyer's presumed competence in debtor-creditor law did not amount to recognized expertise in a particular body of federal, nationally uniform, foreign, or international law applicable to the matter. In particular, the opinion concluded that general debtor-creditor law is not the type of nationally uniform law contemplated by the rule.[81] For all of the above reasons, the opinion concluded that there was no basis upon which the out-of-state lawyer could ethically represent Ohio clients in debt-settlement matters.

Immigration lawyers should not need to rely on MR 5.5(c)(4) to provide immigration legal services in states outside their home jurisdiction on a temporary basis [or permanent basis] because immigration practice would be permitted under MR 5.5(d). However, there might be occasions when an immigration lawyer is called upon to provide services for immigration clients that involve the law of states in which the immigration lawyer is not admitted. This may include: (1) providing legal advice about criminal law, such as advising a client regarding state criminal statutes to avoid a finding of a conviction of a deportable crime, (2) providing legal advice about civil law, such as advising an immigration business client on matters related to state employment, or wage and hour law of an out-of-state jurisdiction, (3) drafting corporate documents that are governed by an out-of-state jurisdiction, or require an analysis of out-of-state corporations law, or (4) providing a formal opinion as to a proposed course of conduct in an out-of-state jurisdiction.[82]

MR 5.5(d)

MR 5.5(d) provides that a "lawyer admitted in another United States jurisdiction or *in a foreign jurisdiction*, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction" under two scenarios. (Emphasis added)

MR 5.5(d) provides exceptions to the general proscription against UPL, but unlike the exceptions in MR 5.5(c), they apply to lawyers admitted in any U.S. jurisdiction *and lawyers admitted in a country outside the U.S. (a foreign lawyer)* MR 5.5(d) carves out two scenarios in which a non-admitted U.S. lawyer or a foreign lawyer may practice on a permanent basis, i.e., a continuous and systematic presence in a jurisdiction in which he is not admitted. [83] As in the case of other exceptions, the non-admitted lawyer who practices under MR 5.5(d) would be subject to the disciplinary authority of the out-of-state jurisdiction.[84]

The exceptions in this sub-section apply to those commonly referred to as in-house lawyers and those, like immigration lawyers, who are authorized practice under federal law. Because a non-admitted lawyer who practices under the MR 5.5(d) may give the false impression-even unwittingly-that she is admitted in the state in which she maintains her practice, the lawyer would be obligated to comply with MR 1.4 concerning proper communication with clients by making it clear to the client at the inception of the representation the limitations on her ability to practice state law. [85] Any representations made by a lawyer concerning limitations on her practice of law in a given jurisdiction would, of course, be subject to the general proscription against intentional

[81] The ABA Commission on Multi-Jurisdictional Practice 2002 identified the areas of "recognized expertise" as including federal tax, securities or anti-trust law and the law of a foreign jurisdiction.

[82] Here again, an immigration lawyer must draw a distinction between providing advice on how a crime would be treated under federal immigration law and whether the client should plead guilty to a criminal offense in another jurisdiction. The lawyer could only properly advise the client about whether the plea she may take under the out-of-state penal code would be considered an aggravated felony or not. When an immigration lawyer advises how a state crime would be considered under federal immigration law, such advice is consistent with her federal immigration practice rather than involving an interpretation of state law.

[83] As noted in Comment 15, consistent with MR 5.5(a) and (b), absent the exceptions under MR 5.5(d), a non-admitted lawyer who wishes to establish an office or other permanent presence in an out-of-state jurisdiction for the practice of state law must become admitted to practice in the jurisdiction.

[84] See Comment 19. Under MR 8.5 a lawyer is always subject to the disciplinary authority of the jurisdiction in which she is admitted. See discussion below.

[85] Comment 20 advises that in some cases "a lawyer who practices law in [a] jurisdiction pursuant to paragraphs (c) or (d) may have to inform the client that the lawyer is not licensed to practice law in this jurisdiction. For example, that may be required when the representation occurs primarily in this jurisdiction and requires knowledge of the law of this jurisdiction. See Rule 1.4(b)."

misrepresentations under MR 8.4(c). Lastly,lawyers practicing under the MR 5.5(d) also must comply with MR 7.1 to 7.5, which address, among other things, advertising and representations on business cards and letterhead.[86] We discuss the interplay of the advertising rules and multi-jurisdictional practice in greater detail at pp. 1-20.

MR 5.5(d)(1)

The first exception applies to legal services that "are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice"

Here, a non-admitted U.S. lawyer or foreign lawyer may provide legal services to an organization or its affiliates in a state in which the lawyer is not admitted if he is employed by the organization, e.g. in-house counsel or government lawyers. An additional requirement is imposed on the foreign lawyer acting as in-house counsel. If that lawyer is called upon to provide advice about state law or U.S. law, the foreign lawyer must seek the advice of a duly admitted lawyer. Under MR 5.5(d)(1), the lawyer cannot provide legal services to any individual associated with the company.[87] Notwithstanding the substantial leeway given to in-house counsel in providing legal services without being admitted in the jurisdiction, in-house lawyers may be subject to state jurisdiction requirements to register, take continuing education courses and comply with client fund registration. [88]

Theoretically, an immigration lawyer, not admitted in the jurisdiction, who is employed by a corporation to handle immigration matters in-house could do so under MR 5.5(d)(1), but as discussed below, immigration lawyers primarily benefit from MR 5.5(d)(2) exception.

MR(d)(2) Federal Exception

The second exception applies to legal services "that the lawyer is authorized by federal or other law or rule to provide in the foreign jurisdiction."

MR 5.5(d)(2) is premised on the notion that the state's power to regulate the practice of law is preempted by federal regulations concerning legal representation before federal agencies or courts. [89] Accordingly, if a lawyer is authorized by federal law, such as by statute, court rule, executive regulation or judicial precedent, MR 5.5(d)(2) permits the lawyer to maintain a continuous and systematic presence in the jurisdiction for the practice of such law. [90]

In the immigration context, MR 5.5 (d)(2) has been generally interpreted as permitting a lawyer to maintain an office limited to the practice of immigration law in a state in which the lawyer is not admitted. This sub-section has been liberally construed.[91] In a tiny minority of states where MR 5.5 has not been adopted verbatim,

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[86] Comment 21 advises that MR 5.5 (c) and (d) "do not authorize communications advertising legal services in this jurisdiction by lawyers who are admitted to practice in other jurisdictions. Whether and how lawyers may communicate the availability of their services in this jurisdiction is governed by Rules 7.1 to 7.5")

[87] See Comment 16 to MR 5.5.

[88] See Comment 17; See ABA Model Rule for Registration of In-House Counsel available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/in_house_registration.authcheckdam.pdf

[89] See, e.g., Sperry v. Florida, 373 U.S. 379(1963)(states may not restrict activities of patent office practitioner under the Supremacy Clause where such practice is authorized under federal law); Augustine v Department of Veterans Affairs, 429 F.3d 1334 (9th Cir. 2005)(state law purporting to govern attorney practice before a federal administrative agency held invalid under Supremacy clause); Matter of Bright, 171 B.R. 799 (E.D. Mich. 1994)(in case involving unauthorized practice by paralegal in bankruptcy court, court held that because there was no federal law or rule concerning the practice of non-lawyers before the bankruptcy courts, Michigan's unauthorized practice law was not preempted and therefore would apply).

[90] See Comment 18; See, e.g., Model Rule on Practice Pending Admission available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105d.authcheckdam.pdf.

[91] See Illinois Ethics Op. 13-08 (2013)(out of state lawyer does not violate MR 5.5 where properly supervised non-lawyer employee performs law-related services while working in an established Illinois office, as long as it is clear that the non-lawyer employee and the out of state lawyer are not authorized to perform legal services involving state law); Phila. Ethics Op. 2004-6 (immigration lawyer is not required to be admitted in Pa. in order to maintain an office there under MR 5.5(d)(2) provided he limits practice to immigration work and

immigration lawyers may not be permitted to maintain a solo office for the practice of immigration law and may be required to form a professional relationship with an in-state lawyer in order to practice in that state.[92] This would appear to run afoul the plain wording of MR 5.5(d), which states that a lawyer may provide legal services in the out-of-state jurisdiction "through an office." The Supreme Court has not reviewed whether New Jersey's rule violates the principles of federal preemption.[93] New Jersey's neighbor New York, which also has not adopted a version of MR 5.5(d), nevertheless, imposes no special requirements on immigration lawyers not admitted in New York who maintain an office solely for the practice of immigration law in New York. [94] New York, like other states, does impose requirements generally, as to what amounts to a "bona fide" office which we discuss in more detail further in this chapter.

In all cases in which a non-admitted lawyer practices out-of-state under MR 5.5(d)(2), the lawyer must make clear to the public that she is not admitted to practice state law in any form, including providing legal advice based on state law. [95] Certainly with respect to immigration matters, this would include disclosure on letterhead, business cards, email signature block in accordance with MR 7.5 that the lawyer is admitted out-of-state (naming state) and that her practice is limited solely to immigration matters.[96] See detailed discussion of interplay of advertising rules and multi-jurisdictional practice below.

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complies with Rule 7.1(a) and 7.5(a); Phila. Ethics. Op 2005-14 (non-admitted immigration lawyer may maintain office for practice of immigration law in Pa.; subject to Pa. disciplinary authority under Rule 8.5; and must comply with Rule 7.1 and 7.5(b) by noting letterhead, office signage, business cards and any other public advertising that she is admitted only in another jurisdiction and that practice is limited solely to immigration law); Alaska Bar Opinion 2010-1(April 27, 2010)(non-admitted lawyer may maintain physical law office in Alaska on permanent basis, as long as lawyer clearly advises clients he is not an Alaska lawyer and does not provide legal advice or services outside of immigration law).

[92] See Office of Disciplinary v. Chandler, No. 10 DB 2010 (Pa. April 15, 2011) (applying New Jersey law to Pa. admitted immigration lawyer, court found that lawyer violated N.J. Rule 5.5 by maintaining office for practice of immigration law as a sole practitioner in New Jersey without being affiliated with a New Jersey admitted lawyer); Missouri Bar Ethics Op. 980062 (July 2013) (Immigration lawyer not admitted in Missouri may not maintain office for the purpose of representing clients and advising clients solely on immigration law). For this reason, lawyers must check the applicable version of MR 5.5 in the relevant state as well as the state version of MR 8.5 (choice of law).

[93] The Court's ruling in Sperry v. Florida, supra, made it obvious that a lawyer may practice anywhere in the United States when authorized by federal law to do so. In its consideration of the 2002 amendments to MR 5.5, the ABA considered omitting Rule 5.5(d)(2) altogether, but ultimately decided to include it explaining that

> "[b]ecause it is axiomatic that a lawyer may perform work when authorized by federal law to do so, the Ethics 2000 Commission initially proposed relegating a provision to this effect to a Comment to Model Rule 5.5. However, the MJP Commission has been told that it is important to lawyers who perform such work that this provision be codified, because at times they have been threatened with sanction for violating state UPL laws.'"

ABA Interim Report of the Commission on Multijurisdictional Practice at 28-29 (November 2001).

[94] Research has not revealed any court decisions holding that a non-New York admitted immigration lawyer is prohibited from maintaining a law practice in New York limited to the practice of immigration.

[95] See e.g. Att. Grievance. Comm. Of Maryland v. Awuah, Dkt. AG No. 3 (September 2003)(Maryland and Wash. DC admitted immigration lawyer with office in Maryland, who continued immigration practice in Maryland for two years during period in which D.C. reciprocal suspension was not in effect did not provide sufficient notice in his letterhead and business cards that he was no admitted/in good standing in Maryland, making it reasonable for any person to assume he was still licensed to practice law in Maryland, in violation Rule 5.5); Wash. DC UPL Op. 17-06 (July 21, 2006)(lawyer based in D.C. with federal practice not admitted in D.C must disclose non-admission and limitation of practice in business documents); Phila. Bar Ethics Op 2005-14 (Rules 7.1 and 7.5(b) require that out of state lawyer note on letterhead, office signage, business cards and other advertising that she is admitted only in the state to which she is licensed and that practice in Pa. limited to immigration law).

[96] Att. Grievance. Comm. Of Maryland v. Ambe, (New York admitted immigration lawyer practicing in Maryland [as would be permitted by MR 5.5(d)] violated Rule 5.5(a) by acting as immigration client's legal representative in dispute with insurance company governed by Maryland law); NYSBA Ethics Op. 863 (May 10, 2011)(opining that question of whether out-of-state lawyer may practice immigration law in New York is 'purely a question of law' not answered by New York's rules (which do not provide for multi-jurisdictional practice), opinion states that lawyer who does so must fairly disclose jurisdictional and subject matter limitations on her practice); New Jersey UPL Advertising Bar Op. 44 (2008)(lawyer working out of New Jersey office of multi-state firm must disclose non-admission in New Jersey and that practice limited to immigration matters).

Special Areas of Concern

Virtual Offices and Bona Fide Office Requirements

As technology continues to develop, many lawyers and law firm are being asked to deliver legal services to clients online. The technology used to provide such services goes well beyond emails and video conferencing. Many lawyers now use special technology called "Software as a Service" (SaaS), a form of cloud computing, to create a virtual law office. [97] The software allows clients to log into a secure account site called a client portal which requires a user name and password. Once logged in, clients can access their case file, communicate with the lawyer via text, view documents, sign engagement agreements and even pay invoices.

Virtual offices may be particularly tempting to immigration lawyers, who may be able to practice anywhere in the country. As virtual offices become more popular, immigration lawyer may easily set up national practices. Further, immigration lawyers have a host of case management software options from which to choose that complement virtual office practice.[98]

Virtual offices may be maintained by lawyers as the primary vehicle by which they provides legal services. However, law firms with physical offices may also use virtual office technology as an adjunct to their practice to accommodate clients with busy schedules. Virtual offices also make it much easier for clients who live and work out of the state (or the country) to obtain legal services.

When a lawyer has a virtual practice his physical presence can essentially be anywhere he uses a computer, but would not necessarily be the location of his practice for purposes of MR 5.5. The controlling factor in determining what would amount to a continuous and systematic practice under MR 5.5 would be the jurisdictional law the lawyer practices. For example, a lawyer admitted in Maine who operates a virtual office from his home in California, but only handles matters involving Maine law, would not be deemed to have created a systematic and continuance presence for the practice of law in California for purposes of MR 5.5.

Lawyers who practice through the use of virtual office technology obviously have the same obligations to comply with the professional rules of responsibility as other lawyers with respect to confidentiality, adequate disclosure and conflicts of interest, for example.[99] However, lawyers who practice out of virtual offices should be particularly careful to avoid misleading content in any advertisement or communication about their practice. In the first instance, this would include disclosure that the practice is a "virtual" one. It would be improper to represent to any client or prospective client that a virtual office automatically permits the lawyer to practice generally in jurisdictions in which the lawyer is not admitted. Further, while a lawyer with a virtual office may wish to use a leased conference room to meet with clients, it would be misleading to advertise that space as the lawyer's "law office" on a letterhead or other public communications.[100]

Some lawyers with virtual practices limited to the practice of law in their home state may still be required to maintain some type of physical office, i.e., a "bona fide" office in that state, notwithstanding the Comments to MR 5.5(a) or the literal wording of MR 5.5(d). For example, under NY Judiciary Law §470, New York admitted lawyers whether residing in or out of state who wish to practice in New York must maintain "an office for the transaction of law business" in the state. This has been interpreted as requiring a physical office that is "more than

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[97] Under this business model, the lawyer obtains a license from the software company to use software that provides the same type of security used by banks, investment entities or government agencies. See Richard Granat & Marc Lauritsen, The Many Faces of E-Lawyering, LAW PRAC., Jan.-Feb (2004) at 36.

[98] See "Software for the Immigration Practioner", ABA GPSOLO available at

http://www.americanbar.org/publications/gp_solo/2013/september_october/software_the_immigration_practitioner.html

[99] See, e.g., California Bar Ethics Op. 2012-84 (lawyer's use of virtual office to deliver legal services triggers same ethical obligations as those imposed on lawyers who practice out of traditional office, among them, duty of confidentiality and competence); Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. (2010-200)(lawyer maintaining virtual law practice must, among other things, disclose to client all information required under the rules, maintain confidentiality as required under the rules and take appropriate precautions to confirm the identities of clients to comply with rules concerning representation of clients with diminished capacity).

[100] See MR 7.1.

merely a place for service of process."[101] Delaware also requires admitted lawyers to maintain a bona fide office in Delaware,[102] as does Virginia.[103]

New Jersey recently amended its bona fide office rule that previously had required New Jersey admitted lawyers to maintain a fixed physical office location in New Jersey in order to practice there. Under the amended rule, New Jersey lawyers are no longer required to maintain a fixed office location and may practice through a virtual office. However, they must abide by certain systems to ensure "prompt and reliable communication" with clients, other lawyers and courts, availability for in-person consultation with clients, designation of an actual location for files and records, hand deliveries and service of process and appointment of the New Jersey Clerk of the Court as agent for service of process.[104] As noted in the Summary of State Variations, New Jersey's statutory scheme and its multi-jurisdictional rule make no mention of lawyers who practice pursuant to federal law. *Once again, we remind immigration lawyers to check the applicable state rules and regulations concerning office requirements.*

Advertising and Multi-jurisdictional Practice

Truthful lawyer advertising is protected speech under the first amendment of the U.S. Constitution,[105] but states are permitted to regulate lawyer advertising to address untruthful or otherwise misleading communication or advertising about the lawyer or the lawyer's firm. In the context of multi-jurisdictional practice, the regulation of lawyer advertising applies not only to communications which describe the lawyer's accomplishments but also to the question as to where the lawyer is authorized to practice.

With respect to the exceptions that permit out of state practice on a temporary basis under MR 5.5(c) or a permanent basis under MR 5.5(d), the non-admitted lawyer must be crystal clear with respect to any jurisdictional limitations on the lawyer's practice. Holding oneself out as being permitted to practice law in a given jurisdiction or otherwise, when that is not the case, amounts to a violation of MR 5.5(b) and is deemed the unauthorized practice of law.[106]

Immigration lawyers who practice in out-of-state jurisdictions may truthfully state in advertisements and in

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[101] Under New York's statutory scheme, lawyers admitted in New York who reside in or out of state who wish to practice in New York must maintain "an office for the transaction of law business." New York Judiciary Law §470; See Schoenefeld v. State of New York, 2015 WL 1423520, ___ N.E.3d ___ (NY March 31, 2015)(New York State Court of Appeals, upon certification from the Second Circuit to state minimum requirements to satisfy NY's office mandate, the statute requires nonresident attorneys to maintain a physical office in New York, not merely a address for service or process as state had argued). That case, Schoenefeld v. Schneiderman, 11-4283-cv (April 2016), which was pending before the U.S. Court of Appeals for the Second Circuit relating to the constitutionality of New York Judiciary Law §470 was decided in the state's favor holding that the law requiring non-resident, New York admitted lawyers to maintain a bonafide office in the state while resident lawyers are not similarly obligated – did not violate the Privileges and Immunities Clause of the Constitution. The court found that the bonafide office requirement was not enacted for protectionist reasons but instead, to ensure that clients could effect personal service on a lawyer who committed malpractice.

[102] Delaware Supr. Ct. R.. 12(d) defines a "bona fide" office as an office where the "attorney practices by being there a substantial and scheduled portion of time during ordinary business hours in the traditional work week. An attorney is deemed to be in an office even if temporarily absent from it if the duties of the law practice are actively conducted by the attorney from that office. An office must be a place where the attorney or a responsible person acting on the attorney's behalf can be reached in person or by telephone during normal business hours and which has the customary facilities for engaging in the practice of law. A bona fide office is more than a mail drop, a summer home which is unattended during a substantial portion of the year or an answering, telephone forwarding, secretarial or similar service." See In Re Barakat, --- A.2d ---, No. 397, 2013 (Del. Sup.Ct 12/11/13) (bankruptcy lawyer who worked out of Pa. home office violated Delaware's "bona fide" office rule).

[103] Va. Regulation 7; Rule 1A:1 (Virginia's rules of admission require that lawyer verify intention to practice law in Virginia and proof that lawyer has rented or acquired a physical office space); Virginia Legal Ethics Opinion 1872 (2013)

[104] See New Jersey UPL Committee Ethics Opinion 27 (March 1, 1993) ("the fact that an out-of-state attorney may be authorized to practice before the Immigration and Naturalization Service does not automatically confer upon him or her the right to maintain an office in this State for that purpose").

[105] See Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (Court upheld right of lawyers to advertise their services, holding that lawyer advertising was commercial speech entitled to protection under the First Amendment noting the benefits of information flowing to consumers, making legal services more accessible to public and improving overall administration of justice).

[106] See discussion at pp. 1-23, infra.

other communications such as websites, letterhead and business cards that they are authorized to practice immigration law, but if the advertisement or other communication does not also make clear that the lawyer is not authorized to practice state law—i.e., that he is not a member of the bar of the state in which he maintains an office—the advertisement could be considered misleading.

We summarize the rules that relate to truthful client communications and multi-jurisdictional practice, particularly MR 1.4(b) and MR 7.1 through MR 7.5, below.

MR 1.4(b) requires that a lawyer provide any information likely necessary for the client to make informed decisions regarding the representation. In the case of multi-jurisdictional practice presumably the client would need to know not only that the lawyer is not a member of the bar of the jurisdiction in which he is practicing, but the basis for any other jurisdictional limitations as to his practice. For the immigration lawyer, practicing in a state in which the lawyer is not admitted, that would include explaining the jurisdictional limitations to his practice, in particular that the lawyer is not authorized to practice state law, subject to certain exceptions explained in this chapter.

MR 7.1 prohibits a lawyer from making a false or misleading communication about the lawyer or the lawyer's services. The prohibition applies to affirmative false statements as well as any omission of a fact necessary to insure that an affirmative statement is not misleading. For the immigration lawyer practicing in a state in which the lawyer is not admitted, the lawyer would have to disclose that the lawyer is not admitted in the state in which the lawyer is practicing and that the lawyer's practice is limited to immigration law.

MR 7.2(c) requires that in any advertisement that provides information about legal services offered by the lawyer or firm, the lawyer must include the name and office address of the lawyer or law firm responsible for its content. As in the case of all lawyers, an immigration lawyer would need to disclose the lawyer's physical office address and if the lawyer maintains only a virtual office, the lawyer would need to provide that information as well.

MR 7.3 prohibits in-person solicitation and requires that any written, recorded or electronic solicitation include the words "Advertising Material." Although not directly related to multi-jurisdictional practice, immigration lawyers who distribute information about immigration matter via brochures or websites should be mindful of this rule as well.

MR 7.4 permits a lawyer to communicate that he does or not practice in a particular area of law, but imposes certain restrictions on representations that a lawyer has been certified as a "specialist" in a certain area of law.[107] Immigration lawyers who maintain offices in an out-of-state jurisdiction should be careful not to use the phrase "immigration law specialist" or state that they "specialize" in immigration practice as a way of explaining that their practice is limited solely to immigration law. Under MR 7.4 lawyers may be deemed specialists only by "an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association.[108] We know of no authority that supports the conclusion that authorization to practice immigration law under—without more denotes—a "specialty" within the meaning of MR 7.4.[109] Immigration lawyers may ethically state that they "focus" their practice on immigration law, or that their practice is "primarily limited" to immigration law, or similar descriptions that do not include prohibited words like "specialist" or "expert."

MR 7.5(a) provides that a lawyer's use of a firm name, letterhead or "other professional designation" must comply with MR 7.1. MR 7.5(a) applies to a firm's identification of nonlawyers as well.[110] In cases where a firm

[107] It should be noted that on September 30, 2015, Florida's Rule 4-7.14(a)(4) which prohibits identification as a specialist in certain forms of advertising, as does MR 7.4, has been held unconstitutional. See Searcy v. Fla. Bar. No. 4:13cv664-RH/CAS (N.D. Fla. Sept. 30, 2015).

[108] In what may be considered a hyper-technical interpretation, a recent New York State Bar opinion advised that a law firm that listed its services under a pre-determined segment of the listing entitled "Specialties" on LinkedIn, a professional social media site, would violate Rule 7.4 unless the lawyer was certified as a specialist in that area of law in accordance with the rule. See NYSBA 972 (June 26, 2013).

[109] Lawyers are reminded to check the applicable state version of MR 7.4 as some states allow designations as specialists.

[110] See e.g., (as to lawyer), New York State Bar Ethics Opinion 863 (May 10, 2011)(under Rule 7.1 and 7.5 (b), lawyer admitted in Texas

maintains offices in more than one jurisdiction, MR 7.5(b) requires that identification of the lawyers in a particular office disclose "the jurisdictional limitations on those not licensed in the jurisdiction where the office is located."[111] This would apply by extension to an office located in only one state which may be staffed by lawyers not admitted in that state, who for example are permitted to practice under MR 5.5(d).[112]

An example of the interplay between multi-jurisdictional practice and advertising for immigration lawyers is the case of a Florida admitted immigration lawyer who maintained an office in South Carolina ostensibly for the practice of immigration law.[113] Although not admitted in South Carolina, she was subject to discipline nevertheless and indefinitely "debarred" from engaging in the practice of law or advertising in South Carolina. Her misconduct involved the following breaches of the advertising rules and multi-jurisdictional practice:

- On her website, she advertised her office location in South Carolina but failed to state that she was not licensed to practice law in South Carolina or to otherwise set forth the jurisdictional limitations on her practice in the state.
- Her website was not limited to the promotion of her federal immigration practice, since she advertised her experience in both criminal and family law and offered to "analyze the facts of [her prospective client's] case by applying current...State Laws."
- Her print media advertisements listed her office location in South Carolina without disclosing the fact that she was not licensed to practice law in South Carolina or disclosing the jurisdictional limitations on her practice in this state.
- She promoted her law firm by broadcasting commercials on Spanish- language radio stations in South Carolina. Respondent's radio commercials included reference to her office in Greenville without disclosing the fact that she was not licensed in South Carolina or disclosing the geographical limitations of her practice of law in the state.

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only practicing immigration law at New York based firm must note her state of licensure on the firm letterhead and business cards on which her name appears and state that her New York practice is limited to immigration matters; opinion recommends that the prudent lawyer should also include "not licensed in New York State.") (and as to nonlawyers), ABA Informal Ethics Op. 89-1527 (1989) (listing of law firm's nonlawyer executive director proper if it shows nonlawyer status and is not false or misleading; listing other nonlawyer support personnel, such as administrators, office managers, administrative assistants, and paralegals, is similarly permissible); Arizona Ethics Op. 90-03 (1990) (nonlawyer personnel may be listed if status is made clear); New York County Ethics Op. 682 (1990) (law school graduates not yet admitted may have cards and be listed on letterhead as "Law Clerk" or "Legal Clerk" or "Not Admitted"); North Carolina Ethics Op. 126 (1992) (nonlawyers may be listed if limited capacity is set forth); Ohio Supreme Court Ethics Op. 89-16 (1989) (office managers, investigators, and legal assistants may not be listed on letterhead, but may have business cards); Pennsylvania Ethics Op. 98-75 (1998) (nonlawyer assistant's name may appear on letterhead if status is properly revealed); Rhode Island Ethics Op. 2006-05 (2006) (firm may employ nurse and include her on letterhead, but must make clear that nurse is nonlawyer); South Carolina Ethics Op. 05-19 (2005) (lobbying firm created by lawyer may list nonlawyer employees in letterhead provided their nonlawyer status is clearly indicated).

[111] New York State Ethics Op. 704 (1998)(law firm headquartered outside New York state may have separate letterhead for New York office address, but names of lawyers not admitted in New York may not appear without specifying jurisdictional limitations; principal office address on the letterhead gives impression that each attorney listed on letterhead is licensed to practice in state where address is located; if that is untrue, clarifying language is needed.); See also Maryland Attorney Grievance Comm'n v. Johnson, 770 A.2d 130, 17 Law. Man. Prof. Conduct 318 (Md. 2000) (lawyer licensed in Virginia and District of Columbia who practiced out of Maryland office as a partnership with Maryland admitted lawyer, disciplined for misleading clients about her jurisdictional limitations; firm's location as listed on letterhead was in Maryland and nothing demonstrated that lawyer was not licensed to practice in Maryland); Arkansas Ethics Op. 2004-03 (2004) (lawyer not licensed in firm's resident state may still be listed on letterhead pending admission if lack of license is noted); Connecticut Informal Ethics Op. 99-2 (1999) (names of attorneys who practice in other states may be listed if clear indication of jurisdictional limits is made).

[112] Lawyers practicing in a federal forum or on a temporary basis in a jurisdiction where they are not licensed must indicate their jurisdictional limitations in letterheads and business cards. See, e.g., District of Columbia Unauthorized Practice Op. 17-06, (2006) (lawyer with D.C. office practicing only in federal forums and not admitted to D.C. bar must disclose jurisdictional limitations on letterhead and business cards); Philadelphia Ethics Op. 2005-14) (lawyer not licensed in Pennsylvania may practice federal immigration law in Pennsylvania but must indicate lack of Pennsylvania license in all professional communications); Virginia Unauthorized Practice Op. 210 (2006) (lawyer practicing trademark law from Virginia office must disclose lack of Virginia license on letterhead).

[113] See In Re Defillo, S.C, No. 2014-001077 (August 13, 2014) (Opinion No. 27431), suspended in Florida and by EOIR March 19, 2015 (reciprocal discipline).

- Her advertisements made references to her firm's "lawyers" and "attorneys" and her letterhead contained the phrase "Attorneys and Counselors at Law" when in fact she was a solo practitioner.
- She used forms of the words "specialist" and "expert" in describing her qualifications even though she was never certified as a specialist by any appropriate entity.
- As for her actual practice, in two instances in which she represented South Carolina clients, she sent letters to judges for the state circuit court in Greenville on firm stationary, requesting certification that the clients were crime victims.

The court held that such conduct violated Rule 7.1 (deceptive communications), Rule 7.4(b) (wrongly holding oneself out as "specialist"), Rule 7.5(a) (deception in letterheads and other professional designation), Rule 7.5(b) (where offices in more than one jurisdiction, failure to indicate jurisdictional limitations and Rule 7.5(d) (deception as to partnership practice). The lawyer was also held to have violated MR 5.5(b) by making representations which suggested she was admitted to practice when that was not the case.[114]

To the degree that lawyer advertising and other professional designations make reference to nonlawyer employees—such as legal assistants or translators—as in the case of many immigration law firms, the lawyer must be careful to provide accurate information about the nonlawyers in advertising and other professional designations(i.e., that those individuals are not lawyers or otherwise authorized to practice law) to avoid the possibility of assisting the unauthorized practice of law under MR 5.5(a).[115]

Choice of Law, Jurisdiction and Unauthorized Practice

When lawyers practice law in states in which they are not admitted and engage in professional misconduct while doing so, disciplinary authorities must address two preliminary issues: (1) Does the out-of-state disciplinary authority have jurisdiction over the non-admitted lawyer? (2) If so, which jurisdiction's professional responsibility rules govern the misconduct? For immigration lawyers who frequently appear before immigration courts or provide immigration representation in states in which they are not admitted, understanding jurisdiction and choice of law rules is essential. Those issues are addressed in MR 8.5, which should be read in conjunction with MR 5.5.[116]

As to jurisdiction, under MR 8.5(a), a lawyer is always subject to the disciplinary authority of the jurisdiction in which he has been admitted, regardless of where any violation of the rules occurs.[117] If the lawyer is not admitted in a jurisdiction but "provides or offers to provide" legal services in that jurisdiction, the lawyer is also subject to the disciplinary authority of the out-of-state jurisdiction.[118] The out-of-state jurisdiction's disciplinary authority over the non-admitted lawyer makes sense and goes hand in hand with the concept of multijurisdictional practice under MR 5.5. The result, however, is that the "non-admitted" lawyer may be subject to the disciplinary authority of both jurisdictions. In addition, when a lawyer is admitted in more than one jurisdiction and engages in

[114] Notably, the court did not address the question of whether her letter to state judges requesting certifications that her clients were crime victims amounted to the actual practice of law in violation of MR 5.5(a) or permissible practice under Rule 5.5(d)(2).

[115] Another example could be an immigration firm advertising fluency in different foreign languages without specifying if those languages are spoken by attorneys or staff members.

[116] Lawyers are also reminded to always check the applicable state's version of MR 8.5 as not all states have adopted MR 8.5 verbatim. The ABA recently updated its survey of state variations as to MR 8.5. which can be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_8_5.authcheckdam.pdf. We do not provide a comprehensive analysis of MR 8.5 in this EC.

[117] see Comment 19 to MR 5.5 and text of MR 8.5(a) which provides that a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

[118] See e.g., In re Tonwe, 929 A.2d 774 (Del. 2007)(lawyer who had been licensed in Pennsylvania, but maintained office in Delaware for practice of federal immigration law and Delaware law in Delaware where she was not admitted engaged in unauthorized practice under Delaware rules of professional conduct; "debarment" imposed "unconditional exclusion from any privilege to practice" in Delaware"; lawyer had also been admitted in Ohio and Wash. DC and had been previously suspended for having a criminal conviction for bribing an immigration official and was reinstated after incarceration).

professional misconduct in one, he would be subject to discipline in each of the jurisdictions.[119]

Immigration lawyers are not only subject to the jurisdiction of the state in which they are admitted, but also the state in which they maintain their practice, the state in which the immigration court is situated, as well as the agency and any circuit court for the court of appeals before which they practice. In such cases, resolving jurisdictional issues without judicial intervention may require cooperation by the disciplinary authorities at issue and the respondent lawyer in the first instance.[120]

Resolution of jurisdictional issues, however, still would not resolve the more complicated issue of which jurisdiction's professional responsibility rules apply, which is addressed in MR 8.5 (b). [121] This sub-section dispels what may be a widely held- but erroneous assumption – that a lawyer is only obligated to comply with the professional responsibility rules of his home jurisdiction. Under MR 8.5(b) there are two bases for determining which jurisdiction's law applies.[122] MR 8.5(b)(1), the simpler of the two, provides that when the lawyer's alleged misconduct occurs in connection with a matter that is before a tribunal, the professional responsibility rules of the jurisdiction in which the tribunal is located apply, unless the tribunal's rules provide otherwise. For immigration lawyers who appear before immigration courts (clearly "tribunals") in an out-of-state jurisdiction as permitted by MR 5.5(d), the rules of the state in which the immigration court sits would be applied.[123] When the alleged misconduct conduct does not involve a matter pending before a tribunal, MR 8.5(b)(2) provides more subjective criteria in determining which rules apply, i.e., (1) the rules of the jurisdiction in which the lawyer's conduct occurred or (2) the rules of the jurisdiction in which the lawyer's conduct would have the "predominant effect." [124]Because it is not always easy to determine the predominant effect, MR 8.5(2) offers a form of safe harbor by providing that a "lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

We reiterate the need for lawyers to be familiar with the applicable professional responsibility rules of the state in which they provide legal services in an immigration matter, as well as the state(s) in which they are admitted.

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[119] When that happens, although not specifically addressed in the model rules, the general practice among state and federal disciplinary authorities in the U.S. that have jurisdiction over the same lawyer is to reach informal agreement as to which one will take the lead conducting the investigation and determining liability and sanction, if appropriate.

[120] For an in depth discussion of the application of federal preemption in the context of MR 5.5(d)(2) and MR 8.5, see Kenneth Craig Dobson, "The Law of Outlaws: Rules and Jurisdiction When Establishing an Out-of-State Practice Under Rule 5.5(D)(2)", AILA (May 15, 2015) available at http://www.aila.org/practice/ethics/ethics-resources/2012-2015/rules-jurisdiction-establishing-out-of-state-pract.

[121] See Comment 6 to MR 8.5 which states that if "two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules."

[122] MR 8.5(b) provides that in "any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur."

[123] The definition of tribunal is discussed in detail in EC 3.3, concerning candor toward a tribunal. The issue of whether entities such as USCIS or the Department of State are tribunals for purposes of the Model Rules has not been resolved conclusively.

[124] For choice of law purposes, when the disciplinary authority in which a non-admitted lawyer has chosen to practice -- either on a temporary or permanent basis -- has not addressed those issues in its own disciplinary rules, under Rule 8.5, the disciplinary rules of the state in which the lawyer is admitted would necessarily apply. See, e.g., In re Morreland-Rucker, Okla., No.SCBD-5494 (June 8, 2010)(under Oklahoma's Rule 5.5, Oklahoma admitted lawyer who had maintained bankruptcy practice in Texas while under suspension in Oklahoma engaged in unauthorized practice of law in Texas, applying Oklahoma rules where Texas had not adopted amended version of MR 5.5)

D. Hypotheticals

Caveat: The information in this section reflects the Committee's views and is not intended to constitute legal advice.

Hypothetical One: Limits on Legal Advice

Ron, a lawyer licensed in Puerto Rico only, establishes an immigration law firm in Massachusetts, a state that has adopted ABA Model Rule 5.5. He has letterhead printed that lists his name along with his firm's name, address, and phone number. Additionally, the letterhead states "Immigration & Nationality Law" and has an asterisk by his name that corresponds to an asterisk by "Licensed in Puerto Rico," written in fine print at the bottom of the page. He begins accepting business, family, and, immigration court cases. On one specific case, his client is first charged with driving under the influence of alcohol and subsequently issued a Notice to Appear by DHS because he is not lawfully present in the United States. Ron advises his client to hire a criminal defense lawyer licensed in Massachusetts, the state where the DUI occurred, but the client refuses to seek criminal counsel and pleads guilty to the charge. Ron files a non-permanent resident cancellation of removal application for his client shortly after being hired. He also files for an employment authorization document (EAD). The immigration judge orders Ron to draft a brief on whether the specific DUI conviction is a crime involving moral turpitude under the Immigration and Nationality Act. As soon as the client receives his EAD, he calls Ron for advice on whether he can apply for a Massachusetts driver's license now that he has his EAD.

Analysis

This scenario addresses the obligations of an out-of-state immigration lawyer to clearly communicate the jurisdictional basis for his practice of law in the state and the scope of any legal services involving a state law matter. Under what circumstances would the provision of advice based on state law amount to UPL under MR 5.5?

Did Ron violate Rule 5.5 by establishing an office in Massachusetts, though he is not licensed there?

No. Under MR 5.5(d)(2) an out-of-state lawyer "may provide legal services through an office in" the state and in addition Comment 15 states that an out of state lawyer practicing under MR 5.5(d)(2) may "**establish** an office" in that state. Ron's admission in Puerto Rico provides a basis for him to act as a "representative" under 8 C.F.R. 292.1, which brings him within the exception to practice law in a state in which he is not admitted under MR 5.5(d)(2). That exception allows him to establishing an office in the state and by definition the lawyer is permitted to extablish a "systematic and continuous presence in the state."[125]

Since Ron maintains an office for the practice of immigration law in a state in which he is not admitted, what are his obligations under MR 5.5 to avoid holding out to the public that he is admitted in the state in which his office is located? Does his letterhead satisfy the requirements of MR 5.5(b)(2)?

Here it appears that Ron has taken steps to avoid giving the impression in his letterhead that he is admitted to practice law in Massachusetts, but those steps fall short. Under MR 5.5, MR 7.1 and MR 7.5, Ron must not make false statements or otherwise mislead the public as to his licensure. Since Ron's office is located in Massachusetts, a client could reasonably assume Ron was admitted in Massachusetts. Ron's disclosure in a small-print footnote at the bottom of the letterhead page that he is admitted in Puerto Rico, even when noticed, does not make clear that he is admitted in Puerto Rico *only***.** The placement of the phrase "Immigration & Nationality Law" under his business address is helpful in identifying the area of law in which he practices but has little bearing on whether he is admitted in Massachusetts. In particular it does not make clear that he is only permitted to practice in that area of law. From a disciplinary perspective, because there is no evidence that he intended to provide false or misleading information, it is not likely that Ron would be sanctioned as long as he amended his letterhead

[125] As discussed, some states may have special requirements regarding bona fide offices which appear to be at odds with the language of MR 5.5(d)(2) and federal preemption under Sperry v. Florida.

information to advise that his practice in Massachusetts is limited to immigration matters and that he is admitted only in Puerto Rico or that he is NOT admitted in Massachusetts.

May Ron advise the client about the immigration consequences of the state law DUI conviction under MR 5.5?

Yes. Since Ron is permitted to practice immigration law in the state under MR 5.5(d)(2) he would be permitted to advise the client about the consequences of the DUI conviction, to wit, that if the client were convicted and the DUI were deemed a crime of moral turpitude, the client would be deported. Ron may have been of the view that the DUI charge did not involve moral turpitude, based on prior experience, but because Ron is not permitted to provide advice as to state law issues per se, Ron was correct in recommending that the client hire criminal defense counsel. Providing advice about the DUI charges when his client did not have criminal defense counsel would have required great care on Ron's part to avoid the client mistakenly assuming that the Ron was authorized to provide advice about the merits of the state's criminal case.

While Ron did not violate MR 5.5(d)(2) when discussing the immigration consequences of a DUI conviction, Ron may have breached his obligation to provide competent and diligent representation by not fully explaining to the client the importance of retaining criminal counsel or recommending that the client consider retaining private counsel. Diligent representation would have included explaining to the client that only a criminal defense lawyer could evaluate the evidence in the DUI case and discuss the client's options vis-à-vis trying to negotiate a lesser charge, pleading guilty to the current DUI charges or taking the chance that he would be acquitted at trial.

Immigration lawyers in similar situations should consider practicing defensively. For example, better practice would have been for Ron to advise the client both orally and in writing to try to use a public defender or hire private counsel for the DUI charge because of the immigration consequences of a conviction. Given that Ron was aware upfront of the potential adverse immigration consequences of the DUI charge, he would have been wise to clarify in his engagement letter with the client that his representation was limited in scope—specifically that he represents the client with respect to his currently-pending immigration charges and nothing else, and in particular was offering no representation as to the criminal matter.[126]

May Ron provide the client with "advice" about obtaining a Massachusetts driver's license?

Yes. Since the information requested is publically available on the State's website, providing this information to the client under these circumstances would most likely not be considered legal advice for purposes of MR 5.5. However, if obtaining a driver's license might have an impact on the client's immigration matter, Ron might need to provide advice about the consequences if any of obtaining a driver's license that would be within the realm of the immigration representation and Ron would not likely be accused of engaging in UPL. Ron might also rely on the exceptions under Rule 5.5(c)(1) (engaging local counsel) or Rule 5.5(c)(3) (services reasonably related to pending matter before a tribunal), but authorization would be less clear because the "reasonably related" language is subject to various interpretations. It should also be noted that the exceptions in MR 5.5 (c) apply only to temporary practice, unlike Rule 5.5(d).

Although Ron is not admitted in Massachusetts, may he brief the issue of whether his client's specific DUI conviction is deemed a crime involving moral turpitude under Massachusetts law as requested by the Immigration Judge? Would doing so amount to conduct which is prohibited under MR 5.5?

This answer turns on the question of whether such conduct amounts to the practice of state law for purposes of MR 5.5.

Yes, Ron may brief the DUI issue because he is not researching the issue to provide legal advice to the client regarding the Massachusetts DUI criminal case. That clearly would constitute the unauthorized practice of law.

[126] In response to newly emerging state immigration laws, immigration lawyers concerned about not violating MR 5.5 may also consider adding the following sentence to their engagement letters or retainer agreements: "I shall not advise you with respect to any state law matter, including but not limited to, state immigration laws." Obviously, this would not be necessary if the lawyer is licensed in that state.

For that reason, as discussed above, Ron recommended that his client retain criminal counsel.[127] Here, Ron is conducting research on a Massachusetts statute in the context of how it affects the immigration law case. Since he is representing the client in a removal case, he would be violating his duty of diligence to the client where, as in the case here, the DUI conviction could affect his eligibility for relief from removal. As part of diligent representation, Ron would have to argue to the court—and support the argument by legal authority—that the client's DUI conviction is not a crime of moral turpitude and, therefore, not a statutory bar to cancellation of removal for nonpermanent residents. The fact that the Immigration Judge asked Ron to brief the issue supports the conclusion that Ron is acting within the scope of his federally authorized work – immigration practice, Rule 5.5(d)(2) specifically allows an out-of-state lawyer to provide "services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction." That rule should not be read to restrict a lawyer from analyzing state law as it impacts immigration law. In this case, the lawyer clearly needs to analyze Massachusetts's law in order to carry out his federally authorized work before the court.

Hypothetical Two: When Expanding Business Becomes Unauthorized Practice

The Law Office, a national business immigration firm, has grown from its ten Maryland admitted founders with one office in Maryland to additional satellite offices in eight other states. Each satellite office is run by a partner licensed in that state. The firm also employs thirty associates, most of whom are licensed in Maryland only, some of whom are licensed only in the satellite office states, and some of whom are licensed in other states. Associates at satellite locations are supervised by the partner in charge of the satellite office or a partner located in any one of the firm's offices, depending on the nature of the work. All of the associates have experience in immigration law, and each has been trained to be familiar with one or more states' employment related laws. This allowed the firm to assign work on state law matters to the appropriate associate in the most efficient and economical way. So as not to mislead any clients, the firm advised associates to indicate their bar licensure on their cards and email signature lines. The firm has also encouraged partners and associates to gain licensure in more than one state so that eventually the firm would have lawyers admitted in every state.

In addition to its business immigration legal services, the firm developed a line of products such as "fifty state" surveys, employment law case summaries, legal updates and newsletters for purchase. The creation of the products, a significant source of revenue, arose from the firm's handling of I-9 compliance matters for large corporations with employees throughout the USA as well as sole proprietors. These clients had questions concerning other employment issues under state and federal law such as state wage and hour laws, workers compensation and anti-discrimination laws. The products are used as a general resource by both clients and non-clients. For retained clients, the firm would also prepare reports or memoranda containing legal advice on state law issues on a confidential basis.

Analysis

This complicated scenario addresses the circumstances under which a lawyer, who is a member of a national law firm, may practice law in a state in which she is not admitted (referred to as an "out-of-state lawyer") as well as the prohibition against assisting an out-of-state lawyer from engaging in the unauthorized practice of law.

General Principles:

Are the out-of-state lawyers in the firm permitted to practice any type of law in the states in which they are not licensed?

No, under MR 5.5(a) and (b), but there are exceptions discussed below.

Are the out-of-state lawyers in the firm permitted to practice immigration law in states in which they are not licensed?

[127] In Padilla v. Kentucky, 130 S. Ct. 1473 (2010) the Supreme Court held that criminal defense attorneys have a Sixth Amendment obligation to advise criminal defendants that a guilty plea may affect their immigration status and result in deportation. See also update on ineffective assistance of counsel proved by American Immigration Counsel at http://www.americanimmigrationcouncil.org/litigation/ineffective-assistance-counsel.

Yes. MR 5.5(d)(2) provides an exception if the out-of-state lawyer is "authorized by federal or other law or rule" to do so. As discussed, with respect to the practice of immigration law, a lawyer admitted in any state may practice immigration law in a state in which she is not licensed because federal law controls. [128] This would apply to the out-of-state associates who practice out of the Maryland office as well as the satellite offices in other states.

Are the firm's instructions that associates indicate their bar licensure on their cards and email signature lines sufficient to avoid any violation of MR 5.5 or MR 7.1(a) or MR 7.5(b), concerning advertising, referenced in Comment 3 to MR 5.5?

Probably not. Since many of the firm's associates (and partners) are not licensed in the state in which they practice immigration law, under MR 5.5(b)(2) and Comment 3 of the rule, they need to avoid giving the appearance that they are authorized to practice state law in the state in which the satellite office is located or the law of other state. Comment 3 indicates that the out-of-state lawyers must also consider MR 7.1 (prohibiting false or misleading communications) and 7.5(b) (requiring disclosure of "jurisdictional limitations"). [129] Here, disclosure of the out-of-state lawyer's state of licensure on business cards and email signature, while accurate may be misleading, since it does not disclose the jurisdictional limitations to their practice, specifically that unless otherwise expressly permitted they are limited to the practice of immigration law. Better practice would be for the out-of-state lawyers to also indicate that their practice is limited to immigration law in cards and signature emails. Similar disclosure would need to be made on firm letterheads if the firm lists the names of partners and associates.

May the firm create and market products—i.e., the fifty-state surveys, employment law case summaries, legal updates and newsletters, limited to state employment law matters— to existing business immigration clients?

Yes. The preparation and publishing of these products, which are the equivalent of self-help legal publications do not amount to the practice of law in the first instance. No lawyer-client relationship is created by the purchase of any of these products. As reflected in the scenario, they are not prepared for or at the request of a particular client or client matter. The products provide general legal information for use by the purchaser. The purchaser provides no confidential information as a part of the purchase and to the degree the products provide legal advice it is not in response to a direct question from the purchaser. Since the preparation and sale of the product does not amount to the practice of law, MR 5.5 does not apply. Good practice for the firm would be to make clear in a disclaimer that the products do not constitute legal advice creating a lawyer-client relationship.

May the firm provide legal services to business immigration clients, in the form of legal advice in reports or memoranda and otherwise on state law employment matters?

Perhaps as described below.

Yes. As discussed above, the firm does not have partners or associates licensed in every state, and only maintains offices for the practice of law in Maryland and satellite offices in eight other states. As a general matter, providing legal advice on state law matters to a particular client amounts to the practice of law in that state. One way the firm could provide such advice, without violating MR 5.5(a) and (b), would be if the services concerned the law of the state in which the satellite office was located. Since each satellite office is run by a lawyer licensed in that state, that office could provide legal advice on state law matters under the partner's name. In that scenario, it would not make any difference if an out-of-state lawyer did the research or even drafted the document provided

[128] As discussed at pp. 1-23, out-of–state immigration lawyers should check the applicable state's rules concerning the establishment of a physical office within the state for the practice of immigration law. In particular, New Jersey requires an immigration lawyer to associate with an in-state lawyer if he wants to practice immigration law out of an office located within the state.

[129] See Comment 2 to MR 7.1 "Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation." See MR 7.5(b) which provides that a "law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located."

to the client, as long as the partner under whose name the advice was provided properly supervised the associate under MR 5.1 (supervision of lawyers) and took responsibility for the work. Alternatively, an associate licensed in the applicable state could also provide the legal advice directly to the client on behalf of the firm without violating MR 5.5(a) and (b), depending on the firm's internal policies as to supervision under MR 5.1.

No. The firm could not provide legal advice to its business immigration clients on state law matters in states in which the firm had no partners or associates licensed in the applicable state. To do so would violate MR 5.5(a) and (b). Such conduct would also not come within the exceptions under MR 5.5(c) which permit the performance of legal services on a temporary basis. The circumstances for practice under that exception are not present here. Since the lawyers at the firm are not in-house counsel to the out-of-state clients and since the practice of state law by out-of-state lawyers is not authorized by federal law, such conduct also does not come within the exceptions under MR 5.5(d).

Hypothetical Three: Using Co-Counsel

Edward has a bustling immigration practice. He is licensed in the District of Columbia. He lives in Virginia and works out of his home office there, which is permissible under MR 5.5(d)(2) because immigration law is federal in nature. In the last year, many of Edward's clients have been children seeking Special Immigrant Juvenile Status (SIJS), which allows the children to seek permanent residency in the U.S. after a state court has granted an adult custody or guardianship of the child, under specified circumstances. Before Edward can file applications before USCIS or EOIR, he must obtain the underlying predicate state custody/guardianship orders from the courts of the Commonwealth of Virginia. Edward contacts two lawyer friends, admitted in Virginia, for help in completing his VA state cases. Lawyer Marsha agrees, on the condition that it is made clear that she is in charge of the state law case and will be paid her fee from the total of the fees collected. Unlike Marsha, Lawyer John does not have time to be solely responsible for the cases, but agrees to act as local counsel to Edward in the Virginia Courts which would include agreeing to pro hac vice Edward in to Virginia courts. Edward would pay Lawyer John a portion of the fee collected from the client for his services as co-counsel. The arrangement works until the Virginia admitted lawyers begin arguing about fees. As a result Edward decides not to use Marsha or John as local counsel. Edward's rationale is that he believes he has become knowledgeable of the law and procedures applicable to the family court component of the SIJS practice and feels comfortable enough to advise his clients about the SIJS process and how to appear in Court pro se. Edward prepares the pleadings for filing under the client's name pro se and prepares the clients for the trial. He makes sure to let the clients know that he is not licensed in VA and that he cannot file the pleadings as counsel or appear in court.

Analysis

This scenario highlights potential problems in engaging local counsel and the interaction between MR 5.5 and MR 1.5.

May Edward practice immigration law in Virginia even though he is only licensed in the District of Columbia?

Yes. Under the exception in MR 5.5 (d)(2) Edward is permitted to establish a continual and systematic presence in Virginia for the practice of immigration law since it is authorized under federal law.

Would Edward be in compliance with MR 5.5 concerning practice based on Virginia law if Lawyer Marsha handles the state law guardianship issue on her own?

Yes. Edward's arrangement with Lawyer Marsha does not require that he practice law in Virginia because Marsha has agreed to handle the legal responsibilities of obtaining guardianship papers solely on her own, assuming full responsibility for the state court matters. As such, Marsha's lawyer-client relationship is completely separate from Edward's, irrespective of whether Edward pays her from the total fees he collects from the client.[130] Marsha's conditions that the client be advised of the financial arrangement comply with the requirements of MR

[130] An agreement to waive confidentiality as between Edward and Marsha would generally be required in the best interests of the clients under MR 1.6 and MR 1.7.

1.5(b), [131] which would ordinarily have to be communicated to the client by Marsha under that section, but there is no prohibition against Edward providing that information in connection with his being retained by the client. Better practice under MR 1.5(b) for both Edward and Marsha would be to have a separate written retainer agreements with the client that sets forth the scope of the representation and the fees charged. Although written retainer agreements are not required under MR 1.5, such agreements protect both the lawyer and the client with respect to any disputes as to the scope of the representation as well as the fees to be charged. [132]

Would Edward be in compliance with MR 5.5 concerning practice based on Virginia law if Lawyer John agrees to act as co-counsel in the state law matter and to assist Edward in seeking pro hac vice status in state court?

Yes, under some of the exceptions under MR 5.5(c). Even though Edward is not admitted in Virginia he could practice law on a temporary basis in Virginia under MR 5.5(c)(1) through his association with Lawyer John acting as local counsel and John's active participation in the matter. John's participation as co-counsel and willingness to accept some responsibility for the guardianship matter should be sufficient to constitute "active" participation. However, Edward should also keep in mind that at least at the commencement of his co-counsel relationship with John, he would have to rely on Lawyer John to provide competent representation in the guardianship matters and would be under a duty to make sure that John was indeed competent.[133] Edward might also be permitted to practice Virginia state law on a temporary basis under MR 5.5(c)(2) because Lawyer John has committed to assisting Edward in obtaining pro hac vice status and the legal matter (guardianship) is "reasonably related" to the SIJ proceeding in immigration court. Since Edward could not appear before the Virginia court without pro hac vice admission, the services that Edward could ethically provide under MR 5.5(c)(2) would be limited mainly to preparatory and advisory work. Here again, Edward would still need to obtain competence in the area of guardianship law.

With respect to the fee arrangement with Lawyer John, it appears that Edward would be paying Lawyer John's fees from the total paid by the client. This type of fee agreement thus involves a division of fees between lawyers not in the same firm which is covered in MR 1.5(e). That model rule[134] permits division of fees, but only under one of two scenarios: (1) when both lawyers work on the matter and divide the fees in proportion to the work performed by each of the lawyers or (2) when both lawyers assume joint responsibility (generally interpreted as meaning financial responsibility in case of malpractice). For either of those scenarios the client must agree to the agreement in a writing, which includes the fees to be received by each and the total fee must be reasonable.[135]

Would Edward be in compliance with MR 5.5 concerning practice based on Virginia law if he decides he is competent enough to assist his clients in proceedings pro se in the guardianship proceeding by preparing all of the applicable court papers for submission by his clients pro se and preparing his clients for their appearance in court a pro se?

No. Under MR 5.5(a) or (b) Edward cannot practice law or hold himself out as being allowed to do so if he is not admitted. Edward's plan to "assist" his clients with proceeding pro se in the guardianship matters still would amount to the unauthorized practice of law by an out-of-state lawyer. That is so because Edward would be

[131] MR 5.5(b) provides in pertinent part that the "scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate."

[132] Lawyers should check the applicable state's rules regarding retainers and fee agreements as there are states which may require written retainers under certain circumstances. See, e.g., N.Y. Part 1215,; New Jersey Rule 1.5(b) requires the agreement to be in writing when the lawyer has not regularly represented the client.; Mass 1.5(mandatory written agreement except when fee under $500).

[133] See EC on MR 1.1.

[134] Immigration lawyers practicing in Virgina should make note that Virgina's version of MR 1.5(e) does permits division of fees only if each lawyer actualy participates in the matter and does not include "joint responsibility" as a basis for division of fees.

[135] See MR 1.5(e). For a comprehensive discussion of MR 1.5, which addresses the reasonableness of fee generally, see upcoming chapter on 1.5.

providing legal advice about the state law requirements for guardianship, preparing the legal documents for review for a court before which he is not admitted to appear and preparing them for trial in the same way as he would if he were representing them.[136]

Hypothetical Four: Have Law Degree, Will Travel!

Tom was admitted to the Oregon state bar in 2010. Tom opened a criminal law practice and had a high volume of clients. In September 2014, the Oregon state bar suspended Tom for a period of one year for violations relating to his trust account. He understood that he could practice immigration law anywhere in the United States with his license and decided to open up an immigration practice in Texas. Tom's letterhead stated "Immigration Lawyer; admitted in Oregon."

In January 2015, Tom was retained on a case where he agreed to represent Lydia in removal proceedings commenced against her in Texas. Lydia also asked him if he could represent her in a criminal shoplifting matter by advising her pro se. Tom had not planned to practice criminal law in Texas, but he felt sorry for Lydia and thought he could help her with what he perceived as a simple criminal matter. They agreed that Tom would provide advice as to what to say and do in criminal court only, in order to keep the fee low.

Lydia appeared pro se in criminal court but the advice Tom had given her turned out to be wrong. Lydia had to pay a significant fine and conduct fifty hours of community service. As a result, she also lost her housekeeping job. As for her immigration matter, Tom forgot to send Lydia the hearing notice and did not appear himself because he forgot to calendar the date in his system. As a result, Lydia received an "*In absentia*" removal order.

Lydia retained new counsel and filed a bar complaint in both Texas and Oregon alleging Tom's neglect and incompetence. She also alleged that Tom violated Rule 5.5 by (1) practicing immigration law while suspended and (2) practicing law in Texas without a state bar license.

Analysis

This scenario addresses the multiple consequences of public discipline on the question of UPL.

How does Tom's suspension affect his ability to practice immigration law in any state?

Under MR 5.5(a) and MR 5.5 (b), Tom may not practice Oregon state law in Oregon or anywhere in the U.S. until such time as he has been reinstated. The only possible exception to MR 5.5 applicable to Tom would be the practice of immigration law, to the degree that federal law authorized such practice. However, under EOIR/DHS regulations unless Tom fell into one of the categories which permit non-lawyers to act as representatives, Tom would not be technically authorized to practice immigration law in any state because of his suspension. Lack of authorization to practice immigration law would be manifested in two ways. To the degree that Tom would be required to file a notice of appearance (G-28 or EOIR-28), Tom would be required to state under penalty of perjury that he is in good standing in the jurisdictions in which he is admitted and that he is not currently under any order of suspension or equivalent prohibition to practice law.[137] Tom would have to disclose his suspension. Of course, if he chose to lie, not only would he be subject to a charge of unauthorized practice under MR 5.5, he would also be charged with engaging in dishonest conduct under MR 3.3 and MR 8.4(c), among other rules concerning dishonesty. Because Tom has never practiced immigration law before or presumably filed any notices of appearance, EOIR's normal procedure of imposing reciprocal discipline when a lawyer who has been

[136] Whether he would be able to act essentially as shadow counsel without disclosing his assistance to the clients, even if he were admitted, would depend on the state's rulings with respect to this type of representation. See, e.g. In Re: Fengling Liu, United States Court of Appeals, Second Circuit, Docket No. 09–90006–am (November 22, 2011)(holding that immigration lawyer who "ghostwrote" brief for client in a "pro se" petition for review did not commit professional misconduct in the absence of any rule requiring that she disclose her participation in the matter and where a number of "authorities" permitted such conduct)

[137] The G-28 requires a law to declare the following:

"I (choose one) (am not) (am) subject to any order of any court or administrative agency disbarring, suspending, enjoining, restraining, or otherwise restricting me in the practice of law. If you are subject to any orders, explain in the space below."

practicing before DHS/EOIR is suspended or disbarred in another jurisdiction would not be triggered. But regardless of whether EOIR disciplined Tom, he would be violating MR 5.5 to engage in the practice of immigration law in any state.

It goes without saying that Tom's "understanding" that he can practice immigration law in any state is incorrect when a lawyer is suspended or disbarred in the state in which he is admitted.

Does Tom's letterhead comply with the requirements of MR 5.5(b)?

No, it does not.

While Tom may have rationalized that his statement that he is "admitted" in Oregon is a correct statement—in that it is the state in which he was admitted—it is clearly misleading because it gives the impression that he is authorized to practice in Oregon and for that reason may also practice immigration law in Texas. As discussed above, because of his Oregon suspension, he cannot be authorized by federal law to represent clients before DHS/EOIR. Unlike the scenario in which information provided on a letterhead regarding jurisdictional limitations may need clarification, this is clearly a misrepresentation and Tom would likely be subject to discipline on this basis as well as the unauthorized practice.

May Tom represent Lydia in removal proceedings?

No. Because Tom would not be permitted to represent Lydia in removal proceedings based on information he provided in the notice of appearance (assuming he was truthful), he is in violation of MR 5.5 by virtue of having accepted Lydia as a client, immigration or otherwise.

May Tom assist Lydia in criminal matter by providing legal advice as long as he does not make an appearance in a Texas court?

No. Since the practice of law includes providing legal advice, Tom's advice to Lydia about how to handle the criminal matter in court violates MR 5.5 (a) and (b). First, there is no question that he is not admitted in Texas – and never was. Either way he would be prohibited from practicing Texas law. The fact that Tom does not "appear" on her behalf does not protect him from an unauthorized practice of law charge because he not only is providing legal advice on a Texas law matter but is holding himself out as being authorized to do so. The same analysis would apply even if Tom were authorized to practice in Oregon.

Does Tom's handling of Lydia's immigration matter trigger other violations of the Model Rules?

Yes, absolutely!

Even if Tom were authorized to practice immigration law, his failure to calendar her appearance, send her the hearing notice and appear at the hearing constitutes lack of diligence (neglect) and incompetence for which he would likely be disciplined, especially in light of his not being authorized to practice in the first instance. As for liability in the criminal matter, he could be subject to a lack of competence disciplinary charge if it turned out that the advice he gave was a result of lack of knowledge of Texas law. He might be liable on the basis of malpractice

What would be the likely outcome of the disciplinary complaint filed against him with disciplinary authorities in both Oregon and Texas?

This question raises a number of issues of substantive law under the Model Rules as well as practical administrative considerations of the two separate disciplinary authorities.

Jurisdiction and Choice of Law

MR 8.5 addresses jurisdiction and choice of law issues[138] which are triggered by the filing of essentially the same complaint in each of the jurisdiction. As an initial matter, under MR 8.5 both Oregon and Texas have

[138] MR 8.5 provides as follows:

a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of

jurisdiction over any professional discipline matters, in Oregon by virtue of Tom's admission in (and suspension from) the Oregon bar and in Texas by virtue of the fact that the provision of legal services-albeit unauthorized-were committed in Texas. Assuming both jurisdictions have the same rules, as a practical matter one of the jurisdictions would usually take the lead in conducting the investigation and imposing discipline. One policy reason is to minimize the possibility of inconsistent results as to liability as well as sanctions.

If Texas and Oregon have different rules as to neglect (Rule 1.3), competence (Rule 1.1) or unauthorized practice (MR 5.5), under MR 8.5 the rules to be applied here should be Texas because the two matters Tom handled were before tribunals located in that state – both the immigration court and criminal court. Under MR 8.5 Texas law should be applied even if the matter were heard by the Oregon disciplinary authorities.

Substantive Violations and Sanctions

Under the facts of this scenario, it is hard to imagine how Tom would not be found to have engaged in the unauthorized practice of both immigration law and Texas criminal law and handled legal matters without competence or diligence. He likely would be found to have engaged in dishonesty based on his letterhead. As for sanction, since Tom was never admitted in Texas, he could not be suspended. However, Texas could impose an injunction against practicing law in Texas and arguably enjoined from ever seeking admission should he be re-instated in Oregon.

Hypothetical Five: Foreign Legal Services

Joe Wu, a respected economics professor at a prestigious Chinese university, has developed a new business to advise wealthy Chinese citizens on their EB-5 regional center investments that will lead to U.S. green cards for themselves and their families.

Prof. Wu's Chinese clients trust him completely to review business plans and recommend specific EB-5 regional center projects. As part of his business, Prof. Wu directs his investor clients to a single law firm that he selects on their behalf to ensure that each EB-5 offering complies with U.S. federal securities law, which is a component of many EB-5 investments. Prof. Wu wants to use the same law firm to document the source and path of funds for each investment and to prepare the required U.S. immigration forms for the investor's EB-5 petition, immigrant visa applications, and the I-829 petition to remove conditions on their permanent residence.

In order to make his business more attractive to clients going forward, Prof. Wu hopes to work out a fixed fee arrangement with the law firm for the legal services necessary to complete the EB-5 and green card process. Prof. Wu intends to charge his clients a flat fee to cover his services and those of the law firm to be paid in installments at each stage of the process.

Prof. Wu contacted a U.S. international law firm (the Firm) with a number of offices in the U.S. (and one in Shanghai) to serve his EB-5 clients because he knows and instinctively trusts the managing partner of the Firm's Shanghai office. The Firm has a large U.S. corporate practice, but not an immigration practice. To take advantage of this potentially lucrative opportunity with Prof. Wu, the Firm's partner in Shanghai, who is not licensed to practice law in any U.S. state, wants to associate with a small U.S. immigration law firm that has EB-5 experience

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this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

to supervise the Firm's Shanghai lawyers in representing Prof. Wu's Chinese clients on their EB-5 cases. None of the lawyers in the Firm's Shanghai office are licensed to practice in any U.S. state.

Analysis

This scenario triggers a number of issues involving the unauthorized practice of immigration law in EB-5 programs, and other professional responsibility rules. In such matters the financial stakes involved are high. The transactions may be complex involving other areas of practice. The arrangements often involve nonlawyers who act as brokers or other go-betweens. Immigration lawyers who are interested in developing EB-5 practices, at a minimum, should take advantage of the volume of articles and workbooks on the subject as well as the many seminars offered by the American Immigration Lawyers Association. [139]

Does the service provided by Professor Wu's EB-5 investment company in and of itself violate the prohibitions against the unauthorized practice of law under MR 5.5(a)?

No. Prof. Wu's advice to clients about EB-5 investments is essentially business advice. He does not hold himself out as being capable of providing legal advice on immigration law or engaging in any of the services performed by a lawyer. Advising clients about a business opportunity that could lead to legal permanent residency without more does not amount to the practice of law. The fact that Professor Wu intends to instruct his clients that they must use the services of lawyers to handle the legal issues associated with the EB-5 investment and immigration process is a further indication that he is not providing legal services to his clients.

May the lawyers in the Shanghai office of the Firm, none of whom are authorized to practice in any U.S. state, provide legal services regarding permanent residency in the U.S. to Professor Wu's clients without violating MR 5.5's prohibition of the unauthorized practice of law?

No. Under MR 5.5(a) and (b), and (d) none of the non-U.S. admitted lawyers at the Shanghai office may practice immigration law or any other U.S. state law. Under MR 5.5(a) and (b), they may not practice state law because they are not admitted to practice in any U.S. state. The exceptions in MR 5.5(d), which do apply to non-U.S. admitted lawyers, still would not permit the non-US admitted lawyers to practice immigration law because federal authorization to practice immigration law is premised on admission and good standing status in a U.S. state(s). The Shanghai based lawyer has neither. Lastly, the exceptions for temporary practice in MR 5.5(c) do not apply to non-US admitted lawyers.[140]

Under what circumstances, if any, could the non-US admitted lawyers in the Shanghai office provide immigration legal services to Professor Wu's Chinese citizen clients without associating with a US immigration law firm?

There are some circumstances, but they are not present in the scenario as presented. As discussed above, barring admission to a state in the U.S., none of the non-US admitted lawyers in the Shanghai office could represent or otherwise provide immigration legal services to Chinese citizens on their own. The non-US admitted lawyers could provide such services if they were directly supervised by one or more of the Firm's U.S. admitted partners located in the U.S. The U.S. admitted partner supervisors would have to take responsibility for the representation by appearing as counsel of record in accordance with DHS/EOIR requirements. Moreover, the Firm's supervising U.S. admitted partner lawyers would have to satisfy, at a minimum, the requirements of competence and diligence. Here, the Firm does not have an immigration practice so presumably no US-admitted partner at the Firm is competent in immigration law. If the Firm's U.S. admitted partner were competent or able to become competent, the supervision by the U.S. admitted partner would be akin to supervision over any nonlawyer under MR 5.3. Anything less than direct supervision, where the supervisor, reviews all work and signs off on it and acts as counsel of record could not only trigger a failure to supervise violation of MR 5.3 (or MR 5.1), but also assisting the unauthorized practice of law of the non-U.S. admitted lawyers in the Shanghai office.

[139] See EB-5 resources in AILA's research library, http://www.aila.org/research-library.

[140] Lawyers are reminded to check the applicable state's version of MR 5.5 to determine if temporary practice by non-U.S. admitted lawyers is permitted and if so under what circumstances. Lawyer should also check other state regulations which may concern foreign admitted lawyers.

Would the Firm's plan to associate with a small U.S. immigration law firm that has EB-5 experience to supervise its Shanghai based non-US admitted lawyers in providing the necessary legal services for Prof. Wu's Chinese clients on their EB-5 cases be consistent MR 5.5 and any other applicable professional rules?

Maybe. Here, at least the non-US admitted Shanghai partner knows that neither he nor the lawyers in his office are competent to provide representation in an immigration law matter and his idea of "associating" with a small U.S. immigration law firm to ensure competent representation is on the right track.[141] However, mere association with the immigration firm would not solve the potential unauthorized practice of law problem. None of the Shanghai office lawyers are admitted in the U.S. and thus none could appear as counsel of record in the immigration matters even if every bit of work done for the client was reviewed and signed-off by the small immigration firm's lawyers. If the small immigrations law firm agreed to act solely in the capacity as supervisors, without becoming counsel of record, they would be violating MR 5.5(a) by assisting the unauthorized practice of law by the non-U.S. admitted Shanghai office lawyers as well.

The only way that the Firm's Shanghai office and the small immigration law firm could structure the handling of the immigration prong of the EB-5 program so that it did not trigger an unauthorized practice problem would be for the small immigration firm to undertake the representation separate from any of the SEC law services provided by the Shanghai office.[142] It is self-evident that the Firm could simply acquire/merge with the smaller immigration firm in order to launch an immigration practice that would complement Professor Wu's EB-5 business or any other business ventures that may require the services of immigration lawyers

Assuming the unauthorized practice issues were resolved, are there any other professional responsibility issues triggered by Professor Wu's plan to "direct" his clients to the Shanghai office of the Firm to obtain the services necessary to obtain legal permanent residency status?

Yes, Potential Conflict of Interest—MR 1.7

The fact that Prof. Wu would "direct" his clients to the Firm to provide legal representation in the EB-5 matter could create a problem of divided loyalty if, for example, the Firm learned something negative about the EB-5 investment that might interfere with the immigration relief sought by the Chinese investor. By the same token, the Firm may learn something about the client that would present a problem for the Professor.

Lawyer/Client Relationship--- MR 1.2, MR 1.4 and MR 5.4 (c).

To the degree that Prof. Wu's business plan contemplates that the clients **must** use the Firm to handle both the SEC and immigration aspects for the EB-5 investment, there is question of "who is the Firm's client" – Prof. Wu or the Chinese investor? Whatever arrangement Professor Wu has with his clients, the lawyer/client relationship between the Chinese investor and the Firm would have to be clear. MR 1.4 (adequate communication) and MR 1.2 (scope of representation) would come into play.

Fees. If the Firm's fees are to be paid by Prof. Wu from the fees he collects from Chinese investor-clients, that information should be disclosed to the client under MR 1.4. Further, while there no proscription against a third party paying a client's fee, MR 5.4(c) prohibits interference with a lawyer's professional judgment by such a person. In addition, MR 1.8 (f) requires that when a third party pays the legal fee of another, among other things, the client must give informed consent.

E. Survey of State Variations

MR 5.5 permits non-admitted lawyers to practice in an out-of-state jurisdiction on a limited basis ("multi-jurisdictional practice"). Most states have adopted a version of MR 5.5, in that they allow for multi-jurisdictional

[141] See Comment 2 to MR 1.1. Competent representation can also be provided through the association of a lawyer of established competence in the field in question (competence). According to MR 1.1, a lawyer may become competent in a given area of law by associating with a competent lawyer.

[142] We know of no authority or procedure by which the small immigration firm could act as co-counsel with the Firm's non-US admitted lawyers or as "local counsel" in an immigration matter.

practice, but only a small number have adopted the rule verbatim. Other states allowing multi-jurisdictional practice have versions that add additional provisions. There also are a handful of states in which temporary practice is still prohibited. We provide a brief history of the versions of MR 5.5 below.

The ABA adopted MR 5.5 in 1983. That version contains two basic provisions precluding a lawyer from practicing law in a jurisdiction "in violation of the regulation of the legal profession in that jurisdiction," and from assisting a person who is not a member of the bar in the unauthorized practice of law. The 1983 version was silent on the question of multi-jurisdictional practice.[143] In 2002, the ABA amended MR. 5.5 to allow for multi-jurisdictional practice by non-admitted U.S. lawyers on a temporary basis under certain enumerated circumstances. The 2002 amended rule also provided that non-admitted U.S. lawyers could practice on a systematic and continuous basis as "in-house" counsel or as otherwise permitted under federal or other law. [144] In 2013, the ABA amended the 2002 version to also allow non-U.S. admitted lawyers to practice as in-house counsel or as otherwise authorized by law or rule. [145]

State versions of MR 5.5 vary in range from subtle to substantial. Lawyers who intend to practice in a state in which they are not admitted should pay careful attention to the applicable state's version of MR 5.5 and check related court imposed rules or statutory law, concerning for example, *pro hac vice* admission, continuing legal

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[143] "[1983 Model] Rule 5.5. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." 1983 Model Rule 5.5.

[144] "[2002 Model] Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction." 2002 Model Rule 5.5.

[145] See MR 5.5(d) adding "in a foreign jurisdiction" and added sub-section MR 5.5(e) requiring that the "foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority., and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction." Many state courts have enacted separate registration requirements for non-admitted U.S. lawyers serving as in-house counsel, and some apply to non-U.S. admitted lawyers. A summary of state in-house registration requirements, which are distinct from the state rules of professional responsibility, may be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_rules.authcheckdam.pdf

education, registration and payment of bar fees. [146] [147] We also advise lawyers to check the state's version of MR 8.5 concerning disciplinary jurisdiction and choice of law, which issues are implicated when non-admitted lawyers engage in multi-jurisdictional practice. See the discussion of MR 8.5 in this chapter.

Because many state versions of MR 5.5 vary in different ways, they are not easily categorized. We therefore discuss each state's rule below in alphabetical order, with the exception of the states whose rules do not provide for multi-jurisdictional practice.

Jurisdictions Where the Rules Do Not Permit Multi-Jurisdictional Practice

Colorado

Colorado's Rule 5.5 essentially mirrors the 1983 ABA version but adds a provision concerning disbarred or suspended lawyers and adds language that helps define the practice of law in the context of suspended or disbarred lawyers.[148] It should be noted that while Colorado's Rule 5.5 does not explicitly permit temporary

[146] Many state courts have enacted separate registration requirements for non-admitted U.S. lawyers serving as in-house counsel, and some apply to non-U.S. admitted lawyers. A summary of state in-house registration requirements, which are distinct from the state rules of professional responsibility, may be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/in_house_rules.authcheckdam.pdf

[147] It also should be noted that in some states, there are court or statutory rules that regulate the practice of law by foreign admitted lawyers sepatrate and apart from the Rules of Professional Conduct, e.g., "legal consultant" status or temporary in-house counsel. Because of the variety and complexity of such court or statutory rules, we do not discuss them here in detail. Lawyers admitted in foreign countries only, or U.S. lawyers considering association with foreign admitted lawyers, should carefully review applicable these state court or statutory rules. An ABA Chart and Summary of State Rules regarding practice of law by non-U.S. admitted lawyers may be found at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mjp_8_9_status_chart.authcheckdam.pdf

[148] "[Colorado] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not:

(1) practice law in this jurisdiction without a license to practice law issued by the Colorado Supreme Court unless specifically authorized by C.R.C.P. 220, C.R.C.P. 221, C.R.C.P. 221.1, C.R.C.P. 222 or federal or tribal law;

(2) practice law in a jurisdiction where doing so violates the regulations of the legal profession in that jurisdiction;

(3) assist a person who is not authorized to practice law pursuant to subpart (a) of this Rule in the performance of any activity that constitutes the unauthorized practice of law; or

(4) allow the name of a disbarred lawyer or a suspended lawyer who must petition for reinstatement to remain in the firm name.

(b) A lawyer shall not employ, associate professionally with, allow or aid a person the lawyer knows or reasonably should know is a disbarred, suspended, or on disability inactive status to perform the following on behalf of the lawyer's client:

(1) render legal consultation or advice to the client;

(2) appear on behalf of a client in any hearing or proceeding or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, or hearing officer;

(3) appear on behalf of a client at a deposition or other discovery matter;

(4) negotiate or transact any matter for or on behalf of the client with third parties;

(5) otherwise engage in activities that constitute the practice of law; or

(6) receive, disburse or otherwise handle client funds.

(c) Subject to the limitation set forth below in paragraph (d), a lawyer may employ, associate professionally with, allow or aid a lawyer who is disbarred, suspended (whose suspension is partially or fully served), or on disability inactive status to perform research, drafting or clerical activities, including but not limited to:

(1) legal work of a preparatory nature, such as legal research, the assemblage of data and other necessary information, drafting of pleadings, briefs, and other similar documents;

(2) direct communication with the client or third parties regarding matters such as scheduling, billing, updates, confirmation of receipt or sending of correspondence and messages; and

(3) accompanying an active member in attending a deposition or other discovery matter for the limited purpose of providing assistance to the lawyer who will appear as the representative of the client.

(d) A lawyer shall not allow a person the lawyer knows or reasonably should know is disbarred, suspended, or on disability inactive status to have any professional contact with clients of the lawyer or of the lawyer's firm unless the lawyer:

(1) prior to the commencement of the work, gives written notice to the client for whom the work will be performed that the disbarred or suspended lawyer, or the lawyer on disability inactive status, may not practice law; and

practice, the Colorado Rules of Civil Procedure permit temporary practice under very limited circumstances. Lawyers not admitted in Colorado should look generally to C.R.C.P. 204 (certifications/limited admissions to practice law) and 205 (other authorizations to practice law) for information on temporary practice.[149] Those rules of procedure permit non-Colorado admitted attorneys to practice law in Colorado on a temporary basis if they (1) reside in Colorado and obtain a single-client counsel certification to represent a client in the State (C.R.C.P. 204.1) and if they are appearing *pro hac vice* (C.R.C.P. 205.1-5).

Hawaii

Hawaii's Rule 5.5 mirrors the language of the 1983 ABA version,[150] but adds a provision prohibiting a lawyer from allowing a disbarred or suspended lawyer working for a law office to contact any clients or others who have legal dealings with the office.[151]

Mississippi

Mississippi Rule 5.5 mirrors the language of the 1983 ABA version.

Montana

Montana Rule 5.5 mirrors the language of the 1983 ABA version.

Texas

Texas Rule 5.5 mirrors the language of the 1983 ABA version.

Wisconsin

Wisconsin Rule 5.5 mirrors the language of the 1983 ABA version.

West Virginia

West Virginia Rule 5.5 mirrors the language of the 1983 ABA version.

Washington, D.C.

Washington, D.C. Rule 5.5 mirrors the language of the 1983 ABA version.

Jurisdictions Where the Rules Permit Multi-Jurisdictional Practice

Alabama

Alabama Rule 5.5 permits temporary practice in circumstances similar to those in MR 5.5, but refers to other Alabama law concerning pro hac vice admission for foreign lawyers, authorization to act as in-house counsel, legal internships, and admission requirements for the Alabama Bar. 5.5.[152], [153], [154] Alabama Rule 5.5(e)

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(2) retains written notification for no less than two years following completion of the work.

(e) Once notice is given pursuant to C.R.C.P. 251.28 or this Rule, then no additional notice is required." CO Rule 5.5

[149] It should be noted that the current published version of Colorado's Rule 5.5 makes reference to Rules 220, 221, 221.1, and 222 of the Colorado Rules of Civil Procedure, those rules have been repealed, effective September 1, 2014.

[150] "[Hawaii] Rule 5. 5. Unauthorized Practice of Law

A lawyer shall not:

(a) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law; or

(c) allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing." HI Rule 5.5.

[151] See HI Rule 5.5(c).

[152] "[Alabama] Rule 5.5. Unauthorized Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) Subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from

specifically provides for the imposition of civil and criminal penalties for lawyers who engage in the unauthorized practice of law.[155], [156], [157] Non-admitted lawyers considering practice in Alabama should be familiar with each of the Alabama procedural rules referenced in its Rule 5.5.

Alaska

Alaska Rule 5.5 is substantively identical to the current version of MR 5.5, with one minor linguistic variation.[158]

Arizona

Arizona Rule adopts MR 5.5 but adds four provisions to its version of Rule 5.5.[159] First, Arizona Rule 5.5(e) requires a lawyer engaged in authorized multijurisdictional practice to receive informed consent to that practice

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practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:

(1) are performed on a temporary basis by a lawyer admitted and in good standing in another of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

(2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or

(3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the Rules Governing Admission to the Alabama State Bar and who is performing only those services defined in that rule.

(c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.

(d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not

(1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.

(e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the Rules Governing Admission to the Alabama State Bar, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law." AL Rule 5.5.

[153] See AL State Bar Rule IX (outlining circumstances where "authorized house counsel" can provide services to its business organization in Alabama, e.g., giving legal advice to the directors, officers, and agents for the business organization; negotiating and documenting matters for the organization; and representing the business organization in dealings with administrative agencies or commissions).

[154] See AL Rule 5.5(b)(3).

[155] See AL Rule 5.5(e).

[156] See AL State Bar Rule VII (providing guidelines for pro hac vice admission in Alabama).

[157] See AL Rule 5.5(e).

[158] Compare AK Rule 5.5(a) (" . . . unless authorized to do so by the laws of that jurisdiction.") with Model Rule 5.5(a) (" . . . in violation of the regulation of the legal profession in that jurisdiction.").

[159] "[Arizona] Rule 5.5. Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter.

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

from the Arizona-based client that the lawyer is advising.[160] Second, Arizona Rule 5.5(f) requires a lawyer engaged in multijurisdictional practice to comply with the Rules of the Supreme Court of Arizona governing *pro hac vice* admission.[161] Third, Arizona Rule 5.5(g) explicitly subjects a lawyer engaged in multijurisdictional practice to Arizona's ethical rules.[162] Fourth, Arizona Rule 5.5(d) requires both lawyers who are admitted to practice law in another United States jurisdiction and lawyers who are admitted in a jurisdiction outside of the United States to register in compliance with Arizona Rule 38(h), governing lawyer registration.[163]

Arkansas

Arkansas has adopted the 2013 version of MR 5.5 which references non-U.S. admitted lawyers.

California

California has not adopted any version of the Model Rules.[164] However, California's rule on unauthorized practice, Rule 1-300, is substantively identical to the 1983 version of MR 5.5 in that it prohibits lawyers from aiding in the unauthorized practice of law, and from practicing law in any jurisdictions where to do so would be in violation of the relevant rules in that jurisdiction.[165]

California does, however, permit some multi-jurisdictional practice as set forth in its Court rules, not its rules of professional conduct. In particular, multi-jurisdictional practice is covered by Division 4 of the California Rules of the Court. Those rules permit non-California admitted attorneys to practice law in California in limited

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(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction as authorized by federal law or other law of this jurisdiction. A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction, and registered pursuant to Rule 38(h) of these rules, may provide legal services in this jurisdiction that are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(e) Any attorney who engages in the authorized multijurisdictional practice of law in the State of Arizona under this rule must advise the lawyer's client that the lawyer is not admitted to practice in Arizona, and must obtain the client's informed consent to such representation.

(f) Attorneys not admitted to practice in the State of Arizona, who are admitted to practice law in any other jurisdiction in the United States and who appear in any court of record or before any administrative hearing officer in the State of Arizona, must also comply with Rules of the Supreme Court of Arizona governing pro hac vice admission.

(g) Any attorney who engages in the multijurisdictional practice of law in the State of Arizona, whether authorized in accordance with these Rules or not, shall be subject to the Rules of Professional Conduct and the Rules of the Supreme Court regarding attorney discipline in the State of Arizona." AZ Rule 5.5.

[160] See AZ Rule 5.5(e).

[161] See AZ Rule 5.5(f).

[162] See AZ Rule 5.5(g).

[163] See AZ Rule 5.5(d); AZ Rule 38(h) (providing guidelines for registration in Arizona of lawyers admitted to practice outside of Arizona and outside of the United States).

[164] Note that the Commission for the Revision of the Rules of Professional Conduct is currently tasked with evaluating the existing California Rules of Professional Conduct, and in particular is tasked with considering "work that has occurred at the local, state and national level with respect to Multi-Disciplinary Practice [ ], Multi-Jurisdictional Practice [ ], [and] unauthorized practice of law . . . ." Commission for the Revision of the Rules of Provisional Conduct, The State Bar of California, http://ethics.calbar.ca.gov/Committees/RulesCommission.aspx. No new rules have yet been adopted, however, and the current rules available on the State Bar of California website are the rules currently in force. See California Rules of Professional Conduct, available at http://rules.calbar.ca.gov/Portals/10/documents/2015_CaliforniaRulesofProfessionalConduct.pdf.

[165] "(A) A member shall not aid any person or entity in the unauthorized practice of law.

(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction." CA 1-300.

circumstances, among them, as counsel *pro hac vice*;[166] military counsel appearing on behalf of a person in military service;[167] out-of state attorney arbitration counsel;[168] foreign attorneys registered as foreign legal consultants;[169] attorneys working for a qualified legal services provider and under the supervision of a California

[166] "(a) Eligibility. A person who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in a particular cause pending in a court of this state, may in the discretion of such court be permitted upon written application to appear as counsel pro hac vice, provided that an active member of the State Bar of California is associated as attorney of record. No person is eligible to appear as counsel pro hac vice under this rule if the person is:

(1) A resident of the State of California;

(2) Regularly employed in the State of California; or

(3) Regularly engaged in substantial business, professional, or other activities in the State of California.

(b) Repeated appearances as a cause for denial. Absent special circumstances, repeated appearances by any person under this rule is a cause for denial of an application." 2015 California Rules of the Court, Rule 9.40 (a) and (b).

[167] "(a) Permission to appear. A judge advocate (as that term is defined at 10 United States Code section 801(13)) who is not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or of the highest court in any state, territory, or insular possession of the United States may, in the discretion of a court of this state, be permitted to appear in that court to represent a person in the military service in a particular cause pending before that court, under the Servicemembers Civil Relief Act, 50 United States Code Appendix section 501 et seq., if:

(1)The judge advocate has been made available by the cognizant Judge Advocate General (as that term is defined at 10 United States Code section 801(1)) or a duly designated representative; and

(2)The court finds that retaining civilian counsel likely would cause substantial hardship for the person in military service or that person's family; and

(3)The court appoints a judge advocate as attorney to represent the person in military service under the Servicemembers Civil Relief Act.

Under no circumstances is the determination of availability of a judge advocate to be made by any court within this state, or reviewed by any court of this state. In determining the likelihood of substantial hardship as a result of the retention of civilian counsel, the court may take judicial notice of the prevailing pay scales for persons in the military service." 2015 California Rules of the Court, Rule 9.41(a).

[168] "(a) Definition. An 'out-of-state attorney arbitration counsel' is an attorney who is:

(1) Not a member of the State Bar of California but who is a member in good standing of and eligible to practice before the bar of any United States court or the highest court in any state, territory, or insular possession of the United States, and who has been retained to appear in the course of, or in connection with, an arbitration proceeding in this state;

(2) Has served a certificate in accordance with the requirements of Code of Civil Procedure section 1282.4 on the arbitrator, the arbitrators, or the arbitral forum, the State Bar of California, and all other parties and counsel in the arbitration whose addresses are known to the attorney; and

(3) Whose appearance has been approved by the arbitrator, the arbitrators, or the arbitral forum." 2015 California Rules of the Court, Rule 9.43(a).

[169] "(a) Definition. A 'registered foreign legal consultant' is a person who:

(1) Is admitted to practice and is in good standing as an attorney or counselor-at-law or the equivalent in a foreign country; and

(2) Has a currently effective certificate of registration as a registered foreign legal consultant from the State Bar.

. . .

(d) Authority to practice law. Subject to all applicable rules, regulations, and statutes, a registered foreign legal consultant may render legal services in California, except that he or she may not:

(1) Appear for a person other than himself or herself as attorney in any court, or before any magistrate or other judicial officer, in this state or prepare pleadings or any other papers or issue subpoenas in any action or proceeding brought in any court or before any judicial officer;

(2) Prepare any deed, mortgage, assignment, discharge, lease, or any other instrument affecting title to real estate located in the United States;

(3) Prepare any will or trust instrument affecting the disposition on death of any property located in the United States and owned by a resident or any instrument relating to the administration of a decedent's estate in the United States;

(4) Prepare any instrument in respect of the marital relations, rights, or duties of a resident of the United States, or the custody or care of the children of a resident; or

(5) Otherwise render professional legal advice on the law of the State of California, any other state of the United States, the District of Columbia, the United States, or of any jurisdiction other than the jurisdiction named in satisfying the requirements of (c) of this rule, whether rendered incident to preparation of legal instruments or otherwise." 2015 California Rules of the Court, Rule 9.44(a) and (d).

attorney working under the same provider;[170] attorneys working as in-house counsel for a qualifying institution; attorneys practicing law temporarily in California as part of a litigation; [171] and non-litigating attorneys temporarily in California to provide legal services.[172] Non-California attorneys considering practice in California should read the relevant California Rules of the Court in detail, as each form of multi-jurisdictional practice varies in restrictions, registration requirements, and in some instances involve specific programs summarized on the State Bar of California website.

Connecticut

Connecticut Rule 5.5 permits temporary practice under similar circumstances as MR 5.5, but deviates in a few ways.[173] First, the Connecticut rule incorporates the definition of the "practice of law" contained in another state

[170] "(b) Scope of practice. Subject to all applicable rules, regulations, and statutes, an attorney practicing law under this rule may practice law in California only while working, with or without pay, at a qualifying legal services provider, as defined in this rule, and, at that institution and only on behalf of its clients, may engage, under supervision, in all forms of legal practice that are permissible for a member of the State Bar of California." 2015 California Rules of the Court, Rule 9.45(b).

[171] "(b) Scope of practice. Subject to all applicable rules, regulations, and statutes, an attorney practicing law under this rule is:

(1) Permitted to provide legal services in California only to the qualifying institution that employs him or her;

(2) Not permitted to make court appearances in California state courts or to engage in any other activities for which pro hac vice admission is required if they are performed in California by an attorney who is not a member of the State Bar of California; and

(3) Not permitted to provide personal or individual representation to any customers, shareholders, owners, partners, officers, employees, servants, or agents of the qualifying institution." 2015 California Rules of the Court, Rule 9.46(b).

[172] "(c) Permissible activities. An attorney meeting the requirements of this rule, who complies with all applicable rules, regulations, and statutes, is not engaging in the unauthorized practice of law in California if the attorney's services are part of:

(1) A formal legal proceeding that is pending in another jurisdiction and in which the attorney is authorized to appear;

(2) A formal legal proceeding that is anticipated but is not yet pending in California and in which the attorney reasonably expects to be authorized to appear;

(3) A formal legal proceeding that is anticipated but is not yet pending in another jurisdiction and in which the attorney reasonably expects to be authorized to appear; or

(4) A formal legal proceeding that is anticipated or pending and in which the attorney's supervisor is authorized to appear or reasonably expects to be authorized to appear.

The attorney whose anticipated authorization to appear in a formal legal proceeding serves as the basis for practice under this rule must seek that authorization promptly after it becomes possible to do so. Failure to seek that authorization promptly, or denial of that authorization, ends eligibility to practice under this rule." 2015 California Rules of the Court, Rule 9.47(c).

[173] "[Connecticut] Rule 5.5. Unauthorized Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession

in that jurisdiction, or assist another in doing so. The practice of law in this jurisdiction is defined in Practice Book Section 2-44A. Conduct described in subsections (c) and (d) in another jurisdiction shall not be deemed the unauthorized practice of law for purposes of this subsection (a).

(b) A lawyer who is not admitted to practice in this jurisdiction, shall not:

(1) except as authorized by law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction which accords similar privileges to Connecticut lawyers in its jurisdiction, and provided that the lawyer is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction, that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential mediation or other alternative dispute resolution proceeding in this or another jurisdiction, with respect to a matter that is substantially related to, or arises in, a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within subdivisions (c) (2) or (c) (3) and arise out of or are substantially related to the legal services provided to an existing client of the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

statute, to provide helpful examples of circumstances under which a lawyer will be held to have "practiced law" in Connecticut.[174] Second, Connecticut Rule 5.5(c) imposes a reciprocity requirement to the circumstances under which a non-admitted lawyer may practice in Connecticut.[175] Third, Connecticut Rule 5.5(d) does not expressly mention foreign admitted lawyers but refers to Practice Book Section 2-15A, which authorizes non-admitted foreign lawyers to act as in-house counsel under circumstances.[176] Fourth, Connecticut Rule 5.5(e) expressly subjects a lawyer not admitted in Connecticut but providing temporary legal services there to the state's disciplinary rules.[177] Fifth and finally, Connecticut Rule 5.5(f) requires a lawyer who is not admitted in Connecticut but who wishes to provide temporary legal services there to do the following: (1) notify the Statewide Bar Counsel of each matter in Connecticut prior to providing services; (2) notify the Statewide Bar Counsel upon termination of each matter in Connecticut; and (3) pay any fees prescribed by the Connecticut judiciary.[178]

Delaware

Delaware Rule 5.5 allows lawyers to engage in temporary practice under the same circumstances as MR 5.5,[179] but deviates from MR 5.5 in a few ways. First, Delaware Rule 5.5(c)'s exceptions permitting temporary

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(d) A lawyer admitted to practice in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) the lawyer is authorized to provide pursuant to Practice Book Section 2-15A and the lawyer is an authorized house counsel as provided in that section; or

(2) the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) A lawyer not admitted to practice in this jurisdiction and authorized by the provisions of this Rule to engage in providing legal services on a temporary basis in this jurisdiction is thereby subject to the disciplinary rules of this jurisdiction with respect to the activities in this jurisdiction.

(f) A lawyer desirous of obtaining the privileges set forth in subsections (c) (3) or (4):

(1) shall notify the statewide bar counsel as to each separate matter prior to any such representation in Connecticut,

(2) shall notify the statewide bar counsel upon termination of each such representation in Connecticut, and

(3) shall pay such fees as may be prescribed by the Judicial Branch." CT Rule 5.5.

[174] See CT Rule 5.5(a); Practice Book § 2-44A (defining the practice of law, generally, as "ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person" and noting that holding oneself out as an attorney, giving advice regarding legal rights, or drafting legal documents are actions falling under this definition).

[175] See CT Rule 5.5(c).

[176] See CT Rule 5.5(d); Practice Book § 2-15A (providing guidelines for admission, including admission of foreign lawyers, in Connecticut as authorized house counsel).

[177] See CT Rule 5.5(e).

[178] See CT Rule 5.5(f).

[179] "[Delaware] Rule 5.5. Unauthorized Practice of Law, Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

practice apply to both non-admitted U.S lawyers and non-U.S admitted lawyers.[180] In addition, Delaware Rule 5.5(d) requires that non-U.S admitted lawyers practicing in Delaware comply with Delaware Supreme Court Rule 55.1(a)(1), which requires them to apply for a certificate of limited practice from the Supreme Court.[181]

Florida

Florida Rule 4-5.5 allows non-admitted U.S. lawyers to engage in temporary practice under almost identical circumstances as MR 5.5, but deviates in that the temporary practice exceptions also apply to non-U.S. admitted lawyers..[182,183] Florida Rule 4-5.5(c) also adjusts the language for the alternate dispute resolution and transactional

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(d) A lawyer admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates after compliance with Supreme Court Rule 55.1(a)(1) and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction." DE Rule 5.5.

[180] See, e.g., DE Rule 5.5(c).

[181] See DE Supreme Court Rule 55.1(a)(1) (governing the application for a Delaware Certificate of Limited Practice for lawyers admitted to practice law in a jurisdiction outside of the United States).

[182] "[Florida] Rule 4-5.5. Unlicensed Practice of Law; Multijurisdictional Practice of Law

(a) Practice of Law. A lawyer may not practice law in a jurisdiction other than the lawyer's home state, in violation of the regulation of the legal profession in that jurisdiction, or in violation of the regulation of the legal profession in the lawyer's home state or assist another in doing so.

(b) Prohibited Conduct. A lawyer who is not admitted to practice in Florida may not:

(1) except as authorized by other law, establish an office or other regular presence in Florida for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida; or

(3) appear in court, before an administrative agency, or before any other tribunal unless authorized to do so by the court, administrative agency, or tribunal pursuant to the applicable rules of the court, administrative agency, or tribunal.

(c) Authorized Temporary Practice by Lawyer Admitted in Another United States Jurisdiction. A lawyer admitted and authorized to practice law in another United States jurisdiction who has been neither disbarred or suspended from practice in any jurisdiction, nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule, may provide legal services on a temporary basis in Florida that are:

(1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or

(2) in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized; or

(3) in or reasonably related to a pending or potential arbitration, mediation, or other

alternative dispute resolution proceeding in this or another jurisdiction, and the services are

not services for which the forum requires pro hac vice admission:

(A) if the services are performed for a client who resides in or has an office in the lawyer's home state, or

(B) where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(4) not within subdivisions (c)(2) or (c)(3), and

(A) are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is authorized to practice, or

(B) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) Authorized Temporary Practice by Lawyer Admitted in a Non-United States Jurisdiction. A lawyer who is admitted only in a non-United States jurisdiction who is a member in good standing of a recognized legal profession in a foreign jurisdiction whose members are admitted to practice as lawyers or counselors at law or the equivalent and are subject to effective regulation and discipline by a duly constituted professional body or a public authority, and who has been neither disbarred or suspended from practice in any jurisdiction nor disciplined or held in contempt in Florida by reason of misconduct committed while engaged in the practice of law permitted pursuant to this rule does not engage in the unlicensed practice of law in Florida when on a temporary basis the lawyer performs services in Florida that are:

(1) undertaken in association with a lawyer who is admitted to practice in Florida and who actively participates in the matter; or

(2) in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the lawyer, or a person the lawyer is assisting, is authorized by law or by order of the tribunal to appear in the proceeding or reasonably expects to be so authorized; or

exceptions by indicating that the client may reside in or have an office in the lawyer's home state.[184] Additionally, while Florida's version of Model Rule 5.5 does not expressly allow foreign lawyers to serve as in-house counsel to a corporation, Florida has adopted an in-house counsel registration requirement that appears to permit such practice on a continuous basis.[185] Lastly, a non-U.S. admitted lawyer may also provide temporary legal services in Florida if those services are primarily governed by international law or the law of foreign jurisdiction where the lawyer is admitted to practice.[186]

Georgia

Georgia Rule 5.5 is different in that it makes a distinction between "domestic" (non-admitted U.S. lawyers) and "foreign" (non-U.S. admitted) lawyers.[187] However, the exceptions for temporary practice by domestic

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(3) in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in Florida or another jurisdiction and the services are not services for which the forum requires pro hac vice admission

(A) if the services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is admitted to practice, or

(B) where the services arise out of or are reasonably related to the lawyer's practice

in a jurisdiction in which the lawyer is admitted to practice; or

(4) not within subdivisions (d)(2) or (d)(3), and

(A) are performed for a client who resides or has an office in a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization, or

(B) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(5) governed primarily by international law or the law of a non-United States jurisdiction in which the lawyer is a member." FL Rule 4-5.5.

[183] See FL Rule 4-5.5(d)(1)-(4).

[184] See FL Rule 4-5.5(c)(1)-(4).

[185] See FL Rule 17-1.4 (governing registration for individuals seeking to serve as in-house counsel for a corporation in Florida and requiring annual renewal).

[186] See FL Rule 4-5.5(d)(5).

[187] "[Georgia] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction.

(b) A domestic lawyer shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the Domestic Lawyer is admitted to practice law in this jurisdiction.

(c) A domestic lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or are reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the Domestic Lawyer, or a person the Domestic Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the Domestic Lawyer's practice in a jurisdiction in which the Domestic Lawyer is admitted to practice.

(d) A domestic lawyer, who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the Domestic Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the Domestic Lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A Foreign Lawyer shall not, except as authorized by this Rule or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law, or hold out to the public or otherwise represent that the lawyer is admitted to practice

lawyers are almost identical to those in MR 5.5, as are the exceptions for continuous practice for in-house counsel or as permitted by Federal Law. Georgia Rule 5.5 also permits a foreign lawyer to engage in temporary practice under essentially the same circumstances as a domestic lawyer, except that any transactional matters must be governed either by international law or the law of a non-U.S. jurisdiction.[188] Georgia expressly requires that foreign lawyers comply with appropriate immigration laws concerning their own status in the country.[189]

Idaho

Idaho Rule 5.5 allows both non-admitted U.S. lawyers and non-U.S. admitted lawyers to practice under largely identical circumstances as MR 5.5, but eliminates the provisions that specifically reference foreign lawyers and the provisions allowing lawyers to provide services through an office or another systematic and continuous presence in the state.[190] The comments to this Rule specifically speak to the omission by stating that,

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law in this jurisdiction. Such a Foreign Lawyer does not engage in the unauthorized practice of law in this jurisdiction when on a temporary basis the Foreign Lawyer performs services in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal held or to be held in a jurisdiction outside the United States if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or by order of the tribunal to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceedings held or to be held in this or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice;

(4) are not within paragraphs (2) or (3) and

(i) are performed for a client who resides or has an office in a jurisdiction in which the Foreign Lawyer is authorized to practice to the extent of that authorization; or

(ii) arise out of or are reasonably related to a matter that has a substantial connection to a jurisdiction in which the lawyer is authorized to practice to the extent of that authorization; or

(iii) are governed primarily by international law or the law of a non-United States jurisdiction.

(f) A Foreign Lawyer who is not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction subject to the following conditions:

(1) The services are provided to the Foreign Lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; and

(2) The Foreign Lawyer is and remains in this country in lawful immigration status and complies with all relevant provisions of United States immigration laws.

(g) For purposes of the grants of authority found in (e) and (f) above, the Foreign Lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation and discipline by a duly constituted professional body or a public authority." GA Rule 5.5.

[188] See GA Rule 5.5(e)-(f).

[189] See GA Rule 5.5 (f)(2).

[190] "[Idaho] Rule 5.5. Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer is authorized by law or order, including pro hac vice admission pursuant to Idaho Bar Commission Rule 227, to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(i) a lawyer who is an employee of a client acts on the client's behalf or, in connection with the client's matters, on behalf of the client's commonly owned organizational affiliates;

(ii) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice; or

(iii) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation.

(c) A lawyer shall not assist another person in the unauthorized practice of law." ID Rule 5.5.

with the exception of circumstances involving actions on behalf of a client's "commonly owned organizational affiliates," the exceptions to Idaho's general prohibition against practice in a foreign jurisdiction are not meant to permit non-admitted lawyers to otherwise establish an office or other permanent presence in the state.[191]

Illinois

Illinois's recently amended Rule 5.5 essentially follows the current version of MR 5.5 with two exceptions: (1) Illinois's Rule 5.5(d) is silent as to requiring that, when faced with a state law question, the non-admitted lawyer be advised by a lawyer licensed and authorized by that jurisdiction to provide such advice,[192] and (2) Illnois's Rule 5.5(e) is silent as to the requirement that the foreign lawyer be subject to effective regulation and discipline in its foreign jurisdiction.[193]

Indiana

Indiana Rule 5.5 permits temporary practice under the same circumstances as MR 5.5, but makes one change involving in-house counsel.[194] Indiana Rule 5.5(d)(1) only allows a non-admitted U.S. lawyer or non-U.S.

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[191] See ID Rule 5.5, Comment 2 ("With the exception of paragraph (b)(2)(i), nothing in this Rule is intended to authorize a lawyer to establish an office or other permanent presence in this jurisdiction without being admitted to practice here.").

[192] Illinois Rule 5.5, as recently amended, provides:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or admitted or otherwise authorized to practice in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized ~~to provide~~ by federal ~~law~~ or other law or rule to provide in ~~of~~ this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Compare IL Rule 5.5(d)(1) (". . . are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission. . . .") with MR 5.5(d)(1) (". . . are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice . . . ").

[193] Compare IL Rule 5.5 (e) ("For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction.") with MR 5.5(e) ("or purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority.").

[194] "[Indiana] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

admitted lawyer to provide legal services to an employer on a temporary basis, and specifically prevents lawyers not admitted to practice in Indiana from establishing an office or other "systematic and continuous presence" in the state.[195] However, as reflected in the comments, in-house counsel wishing to establish a systematic and continuous presence in Indiana may apply for a "business license" under Indiana rules of admission. Despite this, the comments to Indiana Rule 5.5 contemplate circumstances where non-admitted lawyers will practice in such a way. For instance, the comments provide specific procedures for non-admitted lawyers who seek to serve as in-house counsel in Indiana.[196]

Iowa

Iowa Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

Kansas

Kansas Rule 5.5 largely follows MR 5.5, but adds specific references to Kansas Supreme Court Rule 712,[197] which governs licensure of lawyers providing services for employers, to subsections (b) and (d).[198] This addition does not appear to substantively impact the rule or its application.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is not admitted to practice in this jurisdiction, but is admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires temporary admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer who is not admitted to practice in this jurisdiction, but is admitted in another United States jurisdiction, or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction if:

(1) the lawyer does not establish an office or other systematic and continuous presence in this jurisdiction for the practice of law and the legal services are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires temporary admission; or

(2) the services are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction." IN Rule 5.5.

[195] See IN Rule 5.5(d)(1).

[196] See IN Rule 5.5, Comments 15-17.

[197] See KS Supreme Court Rule 712, "Restricted Licensure of Attorneys Providing Legal Services for Single Employers" (providing guidelines for admission in Kansas for lawyers who provide legal services to their employers).

[198] "[Kansas] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law (including Kansas Supreme Court Rule 712), establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

Kentucky

Kentucky Rule 5.5 allows for temporary practice, but adds additional provisions requiring compliance with state rules governing limited admission to practice.[199] First, Kentucky Rule 5.5(c) requires a non-admitted U.S. lawyer to either comply with or be exempt from Kentucky Supreme Court Rule 3.030(2), which requires a lawyer not admitted in Kentucky to pay a $270 fee per case and engage local counsel to perform legal services in the state.[200] Second, Kentucky Rule 5.5(d) allows a non-admitted U.S. lawyer to provide legal services that comply with Kentucky Supreme Court Rule 2.111, governing limited practice for in-house counsel in Kentucky.[201] Third and finally, Kentucky Rule 5.5(e) expressly subjects lawyers practicing under this rule to the Kentucky Rules of

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(2) are services in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates; are not services for which the forum requires pro hac vice admission; and, when performed by a foreign lawyer and requires advice on the law of this or another jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; and otherwise complies with Kansas Supreme Court Rule 712; or

(2) are services that the lawyer is authorized by federal law or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." KS Rule 5.5.

[199] "[Kentucky] SCR 3.130(5.5). Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b)A lawyer who is not admitted to practice in this jurisdiction shall not:
(1) except as authorized by these Rules or other law, establish or maintain an office or other presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction if such services:

(1) comply with SCR 3.030(2), or they do not require compliance with SCR 3.030(2) due to federal statute, rule or regulation; or
(2) are in, or reasonably related to, a pending or potential proceeding before a tribunal or alternative dispute resolution proceeding in another jurisdiction for a client, or prospective client pursuant to Rule 1.18, if the services arise out of, or are reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission pursuant to SCR 3.030(2); or

(3) are not within paragraph (c) (2) and arise out of, or are reasonably related to, the representation of the lawyer's client in the jurisdiction in which the lawyer is admitted.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) comply with SCR 2.111 regarding a Limited Certificate of Admission to Practice Law in this jurisdiction; or
(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer authorized to provide legal services under this Rule shall be subject to the Kentucky Rules of Professional Conduct and shall comply with SCR 3.030(2) or, if such legal services do not require compliance with that Rule, the lawyer must actively participate in, and assume responsibility for, the representation of the client." KY Rule 3.130(5.5).

[200] See KY Rule 3.130(5.5)(c)(1); KY Supreme Court Rule 3.030(2) (requiring a lawyer who is admitted to practice law in another United States jurisdiction to pay a fee of $270 per case to provide legal services in Kentucky).

[201] See KY Rule 3.130(5.5)(d)(1); KY Supreme Court Rule 2.111 (governing the issuance of a Limited Certificate of Admission to Practice Law).

Professional Conduct and requires the lawyer to actively participate in and assume responsibility for the representation.[202]

Louisiana

Louisiana Rule 5.5 permits temporary practice, but differs from MR 5.5 in several ways.[203] First, Louisiana adds a provision, concerning suspended or disbarred lawyers. A lawyer may not employ or associate with a

[202] See KY Rule 3.130(5.5)(e); see, generally, KY Rules of Professional Conduct.

[203] "[Louisiana] Rule 5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law [in a jurisdiction] in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission and that are provided by an attorney who has received a limited license to practice law pursuant to La. S. Ct. Rule XVII, § 14; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e)(1) A lawyer shall not:

(i) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment, or any person the attorney knows or reasonably should know is an attorney who has permanently resigned from the practice of law in lieu of discipline; or

(ii) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a suspended attorney, or an attorney who has been transferred to disability inactive status during the period of suspension or transfer, unless first preceded by the submission of a fully executed employment registration statement to the Office of Disciplinary Counsel, on a registration form provided by the Louisiana Attorney Disciplinary Board, and approved by the Louisiana Supreme Court.

(e)(2) The registration form provided for in Section (e)(1) shall include:

(i) The identity and bar roll number of the suspended or transferred attorney sought to be hired;

(ii) The identity and bar roll number of the attorney having direct supervisory responsibility over the suspended attorney, or the attorney transferred to disability inactive status, throughout the duration of employment or association;

(iii) A list of all duties and activities to be assigned to the suspended attorney, or the attorney transferred to disability inactive status, during the period of employment or association;

(iv) The terms of employment of the suspended attorney, or the attorney transferred to disability inactive status, including method of compensation;

(v) A statement by the employing attorney that includes a consent to random compliance audits, to be conducted by the Office of Disciplinary Counsel, at any time during the employment or association of the suspended attorney or the attorney transferred to disability inactive status, and

(vi) A statement by the employing attorney certifying that the order giving rise to the suspension or transfer of the proposed employee has been provided for review and consideration in advance of employment by the suspended attorney, or the attorney transferred to disability inactive status.

disbarred lawyer at all and may only employ a suspended lawyer if the lawyer obtains an approved employment registration form filed with the disciplinary authority.[204] The rule prohibits a suspended lawyer from handling client funds,[205] and requires employers to give written notification of termination of the suspended lawyer.[206] Louisiana's Rule 5.5(e)(3) also provides a list of activities constituting the practice of law: (1) holding oneself out as an attorney or lawyer; (2) rendering legal consultation or advice to a client; (3) appearing on behalf of a client in any hearing or proceeding before a body operating in an adjudicating capacity; (4) appearing as a representative of a client at a deposition or other discovery matter; (5) negotiating or transacting a business deal on behalf of a client; or (6) engaging in any other activity defined by law or Louisiana Supreme Court ruling as constituting the practice of law.[207] Louisiana's Rule does not reference temporary or in-house counsel practice by non-U.S. admitted lawyers.

Maine

Maine Rule 5.5 is substantively identical to the 2002 version of MR 5.5, with some variations in language that do not impact the basic provisions. [208]

Maryland

Maryland Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

Michigan

Michigan Rule 5.5 is substantively identical 2002 version of MR 5.5, with some variations in language that do not impact the basic provisions.

Minnesota

Minnesota Rule 5.5 permits temporary practice as set forth in the 2002 version of MR 5.5 but may be read as to include most of the substance of the current version of MR 5.5. [209] First, Minnesota Rule 5.5(d), , does not

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(e)(3) For purposes of this Rule, the practice of law shall include the following activities:

(i) holding oneself out as an attorney or lawyer authorized to practice law;

(ii) rendering legal consultation or advice to a client;

(iii) appearing on behalf of a client in any hearing or proceeding, or before any judicial officer, arbitrator, mediator, court, public agency, referee, magistrate, commissioner, hearing officer, or governmental body operating in an adjudicative capacity, including submission of pleadings, except as may otherwise be permitted by law;

(iv) appearing as a representative of the client at a deposition or other discovery matter;

(v) negotiating or transacting any matter for or on behalf of a client with third parties;

(vi) otherwise engaging in activities defined by law or Supreme Court decision as constituting the practice of law.

(e)(4) In addition, a suspended lawyer, or a lawyer transferred to disability inactive status, shall not receive, disburse or otherwise handle client funds.

(e)(5) Upon termination of the suspended attorney, or the attorney transferred to disability inactive status, the employing attorney having direct supervisory authority shall promptly serve upon the Office of Disciplinary Counsel written notice of the termination." LA Rule 5.5.

[204] See LA Rule 5.5(e)(1).

[205] See LA Rule 5.5(e)(4).

[206] See LA Rule 5.5(e)(5).

[207] See LA Rule 5.5(e)(3).

[208] See MI Rule 5.5(c) and (d) (" . . . in another jurisdiction of the United States."), cf. Model Rule 5.5 (c) and (d) (" . . . in another United States jurisdiction . . . "); See ME Rule 5.5 which contains a linguistic change in the section permitting temporary legal services to "existing" clients, which does not appear to alter the rule substantively.

[209] "[Minnesota] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so, except that a lawyer admitted to practice in Minnesota does not violate this rule by conduct in another jurisdiction that is permitted in Minnesota under Rule 5.5(c) and (d) for lawyers not admitted to practice in Minnesota.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

expressly permit a lawyer to practice in an in-house capacity. However, under Minnesota Rules of Admission 9 and 10, out-of-state lawyers may obtain temporary or permanent in-house counsel admission.[210] Second, Minnesota Rule 5.5(a) adds language stating that lawyers admitted in Minnesota do not violate Rule 5.5 for acts in other jurisdictions permitted by Minnesota Rule 5.5(c) and (d).[211] Minnesota's rule does not reference temporary or in-house counsel practice by non-U.S. admitted lawyers.

Missouri

Missouri Rule 5.5 is substantively similar to MR 5.5 permitting temporary practice, but varies by adding further requirements for temporary practice in the state.[212] Missouri's rule is silent as to whether non-U.S. admitted lawyers may practice on a temporary basis or as in-house counsel.

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(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraph (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction." MN Rule 5.5.

[210] Cf. Model Rule 5.5(d)(1).

[211] See MN Rule 5.5(a).

[212] "[Missouri Rule] 4-5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by this Rule 4 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this (c) A lawyer admitted and authorized to practice law in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction if the lawyer or a person the lawyer is assisting is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction if the services arise out of or are practice law and are not services for which the forum requires pro hac vice admission;

(4) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(5) are not within paragraphs (c)(2), (c)(3) or (c)(4) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted and authorized to practice law.

(d) A lawyer admitted in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law and provide legal services in this jurisdiction that are provided to the lawyer's employer or its organizational affiliates if the lawyer has obtained a limited license pursuant to Rule 8.105 or a general license pursuant to other provisions of Rule 8.

(e) A lawyer shall not practice law in Missouri if the lawyer is subject to Rule 15 and, because of failure to comply with Rule 15, The Missouri Bar has referred the lawyer's name to the chief disciplinary counsel or the commission on retirement, removal and discipline." MO Rule 4-5.5.

Missouri's rule does not expressly provide that a lawyer may practice on a continuing basis if permitted by Federal law, but Rule 4-5.5(b)(1) permits a lawyer to maintain such practice if permitted by "other law."[213] Missouri Rule 4-5.5(c) also adds the qualifier to temporary practice that the out-of-state lawyer be both admitted and "authorized" to practice in their home jurisdiction.[214] Missouri Rule 4-5.5(c)(4) allows out-of-state lawyers to provide temporary legal services to the lawyer's employer if *pro hac vice* admission is not required.[215] Under Missouri Rule 4-5.5(d) a non-admitted U.S. lawyer may serve as in-house counsel on a continuing basis if the lawyer obtains a limited license pursuant to Missouri Rule 8.105 or a general license pursuant to Missouri Rule 8.[216] Missouri Rule 4-5.5(d) does not reference foreign lawyers, suggesting that lawyers admitted to practice in foreign jurisdictions cannot practice under these exceptions.[217] Finally, Missouri Rule 5.5(e) prohibits lawyers from practicing law in Missouri if they do not comply with the continuing legal education requirements of Rule 15 and, as a result, are referred to the chief disciplinary counsel or the commission on retirement, removal, and discipline by the Missouri Bar.[218]

Nebraska

Nebraska Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

Nevada

Nevada Rule 5.5, which is structured differently, allows non-admitted U.S. lawyers to temporarily practice in the state under the circumstances contemplated by MR 5.5 and additional circumstances unique to the state.[219] It does not expressly reference practice by non-U.S. admitted lawyers.

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[213] See MO Rule 4-5.5(b)(1).

[214] See MO Rule 4-5.5(c).

[215] See id.

[216] See MO Rule 4-5.5(d); MO Rule 8.105 (governing in-house counsel limited license to practice law in Missouri); MO Rule 8 (governing general license to practice law in Missouri).

[217] See MO Rule 4-5.5(d).

[218] See MO Rule 4-5.5(e); MO Rule 15 (requiring Missouri lawyers to receive three hours of continuing legal education credit during every three-year reporting period).

[219] "[Nevada] Rule 5.5. Unauthorized Practice of Law

(a) General rule. A lawyer shall not:

(1) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) Assist another person in the unauthorized practice of law.

(b) Exceptions. A lawyer who is not admitted in this jurisdiction, but who is admitted and in good standing in another jurisdiction of the United States, does not engage in the unauthorized practice of law in this jurisdiction when:

(1) The lawyer is authorized to appear before a tribunal in this jurisdiction by law or order of the tribunal or is preparing for a proceeding in which the lawyer reasonably expects to be so authorized;

(2) The lawyer participates in this jurisdiction in investigation and discovery incident to litigation that is pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(3) The lawyer is an employee of a client and is acting on behalf of the client or, in connection with the client's matters, on behalf of the client's other employees, or its commonly owned organizational affiliates in matters related to the business of the employer, provided that the lawyer is acting in this jurisdiction on an occasional basis and not as a regular or repetitive course of business in this jurisdiction;

(4) The lawyer is acting with respect to a matter that is incident to work being performed in a jurisdiction in which the lawyer is admitted, provided that the lawyer is acting in this jurisdiction on an occasional basis and not as a regular or repetitive course of business in this jurisdiction;

(5) The lawyer is engaged in the occasional representation of a client in association with a lawyer who is admitted in this jurisdiction and who has actual responsibility for the representation and actively participates in the representation, provided that the out-of-state lawyer's representation of the client is not part of a regular or repetitive course of practice in this jurisdiction;

(6) The lawyer is representing a client, on an occasional basis and not as part of a regular or repetitive course of practice in this jurisdiction, in areas governed primarily by federal law, international law, or the law of a foreign nation; or

(7) The lawyer is acting as an arbitrator, mediator, or impartial third party in an alternative dispute resolution proceeding.

Nevada Rule 5.5(b) sets forth the exceptions under which lawyers may temporarily practice in the state. While phrased very differently, these exceptions are substantively similar to those outlined in the MR 5.5 , with the following linguistic changes. First, Nevada replaces the word "temporary" with the phrase "occasional basis" in its version of Rule 5.5.[220] Second, Nevada replaces the phrase "systematic and continuous" with the phrase "regular or repetitive" in its version of the Model Rule.[221]

Nevada's version of the Rule 5.5 does contain two notable changes. First, Nevada Rule 5.5(b)(4) allows an out-of-state lawyer working on a matter "incident" to a matter in the jurisdiction where the lawyer is admitted to practice in Nevada, provided the lawyer is acting on an occasional basis.[222] The use of the word "incident" instead of "reasonably related" (as used in MR 5.5) may expand the scope of an out-of-state lawyer's ability to practice in Nevada, since it could include arbitrations and similar adjudicative proceedings. Second, under Nevada Rule 5.5(b)(7), an out-of-state lawyer acting as an arbitrator, mediator, or impartial third party in an alternative dispute resolution proceeding can practice in Nevada.[223]

Nevada Rule 5.5(d)(2) disallows a lawyer not admitted to practice in Nevada from establishing an office or regular presence in Nevada, soliciting clients in Nevada, or representing to the public that the lawyer is admitted to practice in Nevada.[224]

Lastly, Nevada Rule 5.5(e) expressly subjects a lawyer practicing under Nevada Rule 5.5(b) to the Nevada Rules of Professional Conduct and the disciplinary jurisdiction of the Nevada Supreme Court and the State Bar of Nevada.[225]

New Hampshire

New Hampshire[226] Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

New Jersey

(c) Interaction with Supreme Court Rule 42. Notwithstanding the provisions of paragraph (b) of this Rule, a lawyer who is not admitted to practice in this jurisdiction shall not represent a client in this state in an action or proceeding governed by Supreme Court Rule 42 unless the lawyer has been authorized to appear under Supreme Court Rule 42 or reasonably expects to be so authorized.

(d) Limitations.

(1) No lawyer is authorized to provide legal services under this Rule if the lawyer:

(i) Is an inactive or suspended member of the State Bar of Nevada, or has been disbarred or has received a disciplinary resignation from the State Bar of Nevada; or

(ii) Has previously been disciplined or held in contempt by reason of misconduct committed while engaged in the practice of law permitted under this Rule.

(2) A lawyer who is not admitted to practice in this jurisdiction shall not:

(i) Establish an office or other regular presence in this jurisdiction for the practice of law;

(ii) Solicit clients in this jurisdiction; or

(iii) Represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction.

(e) Conduct and discipline. A lawyer admitted to practice in another jurisdiction of the United States who acts in this jurisdiction pursuant to paragraph (b) of this Rule shall be subject to the Nevada Rules of Professional Conduct and the disciplinary jurisdiction of the Supreme Court of Nevada and the State Bar of Nevada as provided in Supreme Court Rule 99." NV Rule 5.5.

[220] See NV Rule 5.5(b)(3)-(6).

[221] See NV Rule 5.5(b)(3)-(6).

[222] See NV Rule 5.5(b)(4).

[223] See NV Rule 5.5(b)(7).

[224] See NV Rule 5.5(d)(2).

[225] See NV Rule 5.5(e).

[226] New Hampshire contains an Ethics Committee Comment which provides that: "Lawyers desiring to provide pro bono legal services on a temporary basis in a jurisdiction that has been affected by a major disaster, but in which they are not otherwise authorized to practice law, as well as lawyers from the affected jurisdiction who seek to practice law temporarily in another jurisdiction, but in which they are not otherwise authorized to practice law, should consult Supreme Court Rule 60, which governs the provision of legal services following determination of major disaster."

New Jersey Rule 5.5 allows for temporary practice under similar circumstances as MR 5.5, but without using the term "temporary". It also does not use the concept of "systematic and continuous presence."[227] Practice on *pro hac vice* or in-house counsel basis must be in compliance with New Jersey Rule 1:21-2[228] and New Jersey Rule 1:27-2, respectively.[229] Rule 5.5(b)(3) enumerates other circumstances where a lawyer may practice in New Jersey: (1) when engaged in negotiations on behalf of an existing client in a jurisdiction where the lawyer is admitted to practice; (2) when representing a client in alternative dispute resolution proceedings on behalf of an existing client, provided the dispute originated in a jurisdiction where the lawyer is admitted to practice; (3) when engaged in discovery for litigation in the jurisdiction where the lawyer is admitted to practice; and (4) when engaged in a matter where the practice arises directly out of the lawyer's representation of an existing client in a

[227] "[New Jersey] RPC 5.5 Lawyers Not Admitted to the Bar and the Lawful Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:

(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) comply with R. 1:21-1(a)(1); and

(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice." NJ Rule 5.5.

[228] See NJ Rule 5.5(b)(1); NJ Rule 1:21-2 (governing pro hac vice admission in New Jersey).

[229] See NJ Rule 5.5(b)(2); NJ Rule 1:27-2 (governing admission as in-house counsel in New Jersey).

jurisdiction where the lawyer is admitted to practice, provided that the practice in New Jersey is occasional and the lawyer's disengagement would be detrimental to the client.[230]

New Jersey Rule 5.5(c) also requires a lawyer not admitted to practice in New Jersey, but acting pursuant to New Jersey Rule 5.5(b), to comply with the following:[231] First, the lawyer must be licensed and in good standing in the jurisdiction where admitted.[232] Second, the lawyer must abide by the New Jersey Rules of Professional Conduct and the disciplinary authority of the Supreme Court of New Jersey.[233] Third, the lawyer must consent to the Clerk of the Supreme Court of New Jersey as an agent upon whom service of process may be made for all actions against the lawyer or her firm.[234] Fourth, the lawyer may not represent to the public that she is admitted to practice in New Jersey.[235] Fifth, the lawyer's office must conform to New Jersey Rule 1:21-1(a)(1), which sets out requirements for effective communication between the lawyer's practice and clients, other counsel, and judicial and administrative tribunals.[236] Lastly, the lawyer must annually comply with the provisions of Rules 1:20-1, 1:28-2, and 1:28B-1, which require the payment of certain fees, during the period of the lawyer's practice.[237] These additional provisions require significantly more obligations for out-of-state lawyers seeking to practice in New Jersey and lawyers should check New Jersey rules cited in this version of Rule 5.5, including bona fide office requirements.

New Mexico

New Mexico Rule 5.5, codified as Rule 16-505, deviates from MR 5.5 in structure and language, but essentially incorporates the substance of MR 5.5. [238] The deviations include the requirement that out-of-state

[230] See NJ Rule 5.5(b)(3).

[231] See NJ Rule 5.5(c).

[232] See NJ Rule 5.5(c)(1).

[233] See NJ Rule 5.5(c)(2).

[234] See NJ Rule 5.5(c)(3).

[235] See NJ Rule 5.5(c)(4).

[236]See NJ Rule 5.5(c)(5); NJ Rule 1:21-1(a)(1) (requiring a lawyer to structure his or her practice in such a manner as to assure "prompt and reliable communication with and accessibility by clients, other counsel, and judicial and administrative tribunals before which the attorney may practice . . . ").

[237] See NJ Rule 5.5(c)(6); NJ Rule 1:20-1 (subjecting a lawyer practicing in New Jersey to the disciplinary jurisdiction of the Supreme Court of New Jersey, requiring the lawyer to pay an annual fee to the Oversight Committee, and requiring the lawyer to file an annual registration statement with the Office of Attorney Ethics); NJ Rule 1:28-2 (requiring a lawyer practicing in New Jersey to pay an annual fee to the Fund for Client Protection); NJ Rule 1:28B-1 (requiring a lawyer practicing in New Jersey to pay an annual fee to the Lawyers Assistance Program).

[238] "[New Mexico Rule] 16-505. Unauthorized practice of law; multijurisdictional practice of law.

A. A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction or assist another in doing so.

B. A lawyer shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney.

C. A lawyer shall not employ or continue the employment of a disbarred or suspended lawyer as a law clerk, a paralegal, or in any other position of a quasi-legal nature if the suspended or disbarred lawyer has been specifically prohibited from accepting or continuing such employment by order of the Supreme Court or the disciplinary board.

D. A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by the Rules of Professional Conduct or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

E. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that in compliance with Rule 24-106 NMRA

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; and

(2) are in or reasonably related to a pending or potential proceeding before a court, legislative body, administrative agency, or other tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.

lawyers comply with New Mexico's *pro hac vice* rule under NM 24-106 NMRA,[239] but does not include provisions relating to lawyers admitted in non-U.S. jurisdictions. New Mexico's rule expressly prohibits a lawyer from employing or continuing the employment of a disbarred or suspended lawyer.[240] Under New Mexico Rule 16-505(c) a lawyer is permitted to employ or continue the employment of a disbarred or suspended attorney as a law clerk or paralegal, provided such employment has not been specifically prohibited by an order of New Mexico's Supreme Court or the disciplinary board of the State Bar.[241]

New York

New York Rule 5.5 mirrors the 1983 ABA version which does not permit multi-jurisdictional practice, but 22 NYCRR §523 (Section 523), recently enacted, expressly permits temporary practice in New York.[242] Although not a rule of professional conduct, Section 523 has the same effect since it basically tracks the current version of MR 5.5 with respect to temporary practice. New York's in-house registration rule, 22 NYCRR § 522, was also recently amended to permit non-U.S. admitted lawyers to serve as in-house counsel subject to essentially the same requirements as those for non-admitted U.S. lawyers. [243]

North Carolina

North Carolina Rule 5.5 largely mirrors MR 5.5, particularly with regard to temporary practice,[244] but adds additional sections pertaining to temporary practice for lawyers whose admission to the North Carolina Bar is

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F. A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction may provide legal services in this jurisdiction that without Rule 24-106 NMRA compliance

(1) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(2) arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. In transactions involving issues specific to New Mexico law, the lawyer shall associate counsel admitted to practice in this jurisdiction;

(3) are provided to the lawyer's employer or its organizational affiliates as in-house counsel subject to any registration requirements and are not services for which the forum requires pro hac vice admission; or

(4) are services that the lawyer is authorized by federal or other law to provide in this jurisdiction." NM Rule 16-505.

[239] See NM Rule 16-505(f).

[240] See NM Rule 16-505(b).

[241] See NM Rule 16-505(c).

[242] See 22 NYCRR §523 at http://www.nycourts.gov/rules/comments/pdf/coa523.pdf

[243] See 22 NYCRR § 522.1 Registration of In-House Counsel

(a) In-House Counsel defined. An in-house counsel is an attorney who is employed full time in this State by a non-governmental corporation, partnership, association, or other legal entity, including its subsidiaries and organizational affiliates, that is not itself engaged in the practice of law or the rendering of legal services outside such organization.

(b) In its discretion, the Appellate Division may register as in-house counsel an applicant who:

(1) (i) has been admitted to practice in the highest law court in any other state or territory of the United States or in the District of Columbia; or (ii) is a member in good standing of a recognized legal profession in a foreign non-United States jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent and subject to effective regulation by a duly constituted professional body or public authority;

(2) is currently admitted to the bar as an active member in good standing in at least one other jurisdiction, within or outside the United States, which would similarly permit an attorney admitted to practice in this State to register as in-house counsel; and

(3) possesses the good moral character and general fitness requisite for a member of the bar of this State.

[244] "[North Carolina] Rule 5.5. Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.
(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or
(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

pending and the employment of suspended or disbarred lawyers. North Carolina Rule 5.5(e) allows lawyers not admitted in North Carolina, but who have pending applications for admission to the North Carolina State Bar, to practice and establish a "continuous and systematic presence" in the state where: (1) the lawyer is licensed in a jurisdiction with which North Carolina has comity in regard to admission to practice law; (2) the lawyer is a member in good standing in every jurisdiction in which the lawyer is admitted; (3) the lawyer has satisfied the educational and experiential requirements of the North Carolina State Bar; (4) the lawyer is domiciled in North

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(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized;

(2) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and the lawyer's services are not services for which pro hac vice admission is required;

(3) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the lawyer's services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required; or

(4) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation and the lawyer is admitted pro hac vice or the lawyer's services are not services for which pro hac vice admission is required.

(d) A lawyer admitted to practice in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, or the equivalent thereof, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer provides legal services to the lawyer's employer or its organizational affiliates; the services are not services for which pro hac vice admission is required; and, when the services are performed by a foreign lawyer and require advice on the law of this or another US jurisdiction or of the United States, such advice is based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or

(2) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice, or the lawyer is providing services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) A lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction and may establish an office or other systematic and continuous presence in this jurisdiction for the practice of law if the lawyer's conduct is in accordance with these Rules, the lawyer is the subject of a pending application for admission to the North Carolina State Bar by comity, having never previously been denied admission to the North Carolina State Bar for any reason, and the lawyer satisfies the following conditions:

(1) is licensed to practice law in a state with which North Carolina has comity in regard to admission to practice law;

(2) is a member in good standing in every jurisdiction in which the lawyer is licensed to practice law;

(3) has satisfied the educational and experiential requirements prerequisite to comity admission to the North Carolina State Bar;

(4) is domiciled in North Carolina;

(5) has established a professional relationship with a North Carolina law firm and is actively supervised by at least one licensed North Carolina attorney affiliated with that law firm; and

(6) gives written notice to the secretary of the North Carolina State Bar that the lawyer intends to begin the practice of law pursuant to this provision, provides the secretary with a copy of the lawyer's application for admission to the State Bar, and agrees that the lawyer is subject to these rules and the disciplinary jurisdiction of the North Carolina State Bar. A lawyer acting pursuant to this provision may not provide services for which pro hac vice admission is required, and shall be ineligible to practice law in this jurisdiction immediately upon being advised that the lawyer's application for comity admission has been denied.

(f) A lawyer shall not assist another person in the unauthorized practice of law.

(g) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(h) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

(i) For the purposes of paragraph (d), the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and are subject to effective regulation and discipline by a duly constituted professional body or a public authority." NC Rule 5.5.

Carolina; (5) the lawyer has a professional relationship with a North Carolina law firm and is supervised by a lawyer admitted to practice in North Carolina; *and* (6) the lawyer provides written notice of her practice under this rule to the North Carolina State Bar.[245] Model Rule 5.5 contains no similar provision.

North Carolina Rule 5.5(g) precludes a lawyer from employing a disbarred or suspended lawyer as a law clerk or legal assistant.[246] North Carolina Rule 5.5(h) precludes a lawyer who employs a disbarred or suspended lawyer from representing any clients that the disciplined lawyer represented during or after the acts resulting in his disbarment or suspension.[247] Model Rule 5.5 contains no similar provision.

North Dakota

North Dakota Rule 5.5 largely mirrors the 2002 version of MR 5.5 in that it does not specifically identify foreign lawyers, and makes certain changes to the circumstances under which a lawyer can engage in temporary practice in the state.[248] North Dakota Rule 5.5(b) sets forth the list of circumstances under which a lawyer admitted to practice in another jurisdiction may provide temporary legal services in North Dakota (unless *pro hac vice* admission or registration is required).[249] First, the lawyer may act on behalf of a client or a client's commonly owned affiliates.[250] Second, the lawyer may act when such action arises out of the lawyer's representation of a client in a jurisdiction where the lawyer is admitted to practice.[251] Third, the lawyer may provide services if the

[245] See NC Rule 5.5(e)(1)-(6).

[246] See NC Rule 5.5(g).

[247] See NC Rule 5.5(h).

[248] "[North Dakota] Rule 5.5. Unauthorized Practice of Law

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer admitted to practice in another jurisdiction and not in this jurisdiction who performs legal services in this jurisdiction on a temporary basis does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer who is an employee of a client, acts on the client's behalf, or on behalf of the client's commonly owned affiliates, except for work for which pro hac vice admission or registration under Admission to Practice R.3 is required;

(2) the lawyer acts with respect to a matter that arises out of the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice, except for work for which pro hac vice admission or registration under Admission to Practice R.3 is required;

(3) with respect to matters for which registration or pro hac vice admission is available under Admission to Practice R.3, the lawyer is authorized to represent a client or is preparing for a matter in which the lawyer reasonably expects to be so authorized;

(4) with respect to matters, transactions or proceedings pending in or substantially related to this jurisdiction and for which pro hac vice admission is not available under Admission to Practice R.3, the lawyer is associated in the matter, transaction or proceeding with a lawyer admitted to practice in this jurisdiction who actively participates in the representation of the client in the matter, transaction or proceeding; or

(5) the lawyer performs a service that may be performed by a person without a license to practice law or without other authorization from a federal, state or local governmental body.

(c) A lawyer admitted to practice in another jurisdiction but not in this jurisdiction, who establishes an office or whose presence is other than temporary in this jurisdiction does not engage in the unauthorized practice of law in this jurisdiction when:

(1) the lawyer who is an employee of a client, acts on the client's behalf, or on behalf of the client's commonly owned affiliates, and the lawyer is eligible for and has complied with the lawyer registration rules under Admission to Practice R.3, or

(2) the lawyer renders services in this jurisdiction pursuant to other authority granted by federal law or a law or Court rule of this jurisdiction.

(d) A lawyer who is not admitted to practice in this jurisdiction shall not represent or hold out to the public that the lawyer is admitted to practice law in this jurisdiction. A lawyer who practices law in this jurisdiction under paragraph(b) or (c) shall disclose in writing to the client that the lawyer is not licensed in this jurisdiction.

(e) A lawyer shall not assist another person in the unauthorized practice of law." ND Rule 5.5.

[249] See ND Rule 5.5(b).

[250] See ND Rule 5.5(b)(1); ND Supreme Court Rule 3 (governing limited registration and pro hac vice admission to practice law in North Dakota).

[251] See ND Rule 5.5(b)(2); ND Supreme Court Rule 3.

lawyer is authorized or expects to be authorized to represent a client in the state.[252] Fourth, the lawyer may provide services where local counsel is engaged and actively participates in the representation.[253] Fifth, the lawyer may provide services that do not require a law license or other authorization from a federal, state, or local governmental body.[254] Note that the rule does not distinguish between domestic and foreign jurisdictions, suggesting that a lawyer admitted anywhere outside North Dakota can provide legal services under this exception.

Additionally, North Dakota Rule 5.5(c), like Model Rule 5.5(d), permits in-house counsel to practice on a continuing basis in the state, but such lawyers must comply with North Dakota Admission to Practice Rule 3, which requires registration fees, among other things.[255] Further, a lawyer who practices law in North Dakota pursuant to North Dakota Rules 5.5(b) or (c) must disclose to a client that he or she is not licensed to practice in the state.[256]

Ohio

Ohio Rule 5.5 is similar to the 2002 version of MR 5.5, in that it permits temporary practice under the enumerated exceptions, but it has a registration requirement and other minor changes.[257]

Oklahoma

Oklahoma Rule 5.5 rule permits temporary practice under the same circumstances outlined in the 2002 version of MR 5.5.[258] The rule contains minor changes, including that the in-house counsel exception does not apply to a business employer that provides legal services to third parties.[259]

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[252] See ND Rule 5.5(b)(3); ND Supreme Court Rule 3.

[253] See ND Rule 5.5(b)(4); ND Supreme Court Rule 3.

[254] See ND Rule 5.5(b)(5).

[255] See ND Rule 5.5(c)(1).

[256] See ND Rule 5.5(c)-(d).

[257] "[Ohio] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law;

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer who is admitted in another United States jurisdiction, is in good standing in the jurisdiction in which the lawyer is admitted, and regularly practices law may provide legal services on a temporary basis in this jurisdiction if one or more of the following apply:

(1) the services are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) the services are reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) the services are reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

(4) the lawyer engages in negotiations, investigations, or other nonlitigation activities that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted and in good standing in another United States jurisdiction may provide legal services in this jurisdiction through an office or other systematic and continuous presence in either of the following circumstances:

(1) the lawyer is registered in compliance with Gov. Bar R. VI, Section 3 and is providing services to the employer or its organizational affiliates for which the permission of a tribunal to appear pro hac vice is not required;

(2) the lawyer is providing services that the lawyer is authorized to provide by federal or Ohio law;

(3) the lawyer is registered in compliance with and is providing pro bono legal services as permitted by Gov. Bar R. VI, Section 3." OH Rule 5.5.

[258] "[Oklahoma] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

Oregon

Oregon Rule 5.5 largely follows MR 5.5 by removing reference to "United States" jurisdictions in order to permit foreign attorneys to temporarily practice in the state.[260] OR 5.5 also adds certain requirements for lawyers not admitted in Oregon who are providing legal services related to a pending arbitration in Oregon.[261] Paragraphs

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(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) Subject to the provisions of 5.5(a), a lawyer admitted in a United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in a jurisdiction where not admitted to practice that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates in connection with the employer's matters, provided the employer does not render legal services to third persons and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction." OK Rule 5.5.

[259] See OK Rule 5.5(d)(1).

[260] See February 19, 2015 amendment comment. ("Phrase 'United States' deleted from paragraphs (c) and (d), to allow foreign-licensed lawyers to engage in temporary practice as provided in the rule.").

[261] "Oregon Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternate dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission;

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; or

(5) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer who provides legal services in connection with a pending or potential arbitration proceeding to be held in this jurisdiction under paragraph (c)(3) of this rule must, upon engagement by the client, certify to the Oregon State Bar that:

(1) the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and

(2) unless the lawyer is in-house counsel or an employee of a government client in the matter, that the lawyer

(i) carries professional liability insurance substantially equivalent to that required of Oregon lawyers, or

(a), (b), and (c)(1)-(4) are identical to the Model Rule. Oregon Rule 5.5(c)(5) is substantively identical to Model Rule 5.5(d).

Oregon Rule 5.5(e) requires lawyers providing legal services in connection with pending or potential arbitrations to certify the following: (1) that the lawyer is in good standing in every jurisdiction in which the lawyer is admitted to practice; and (2) that the lawyer, unless she is serving as in-house counsel or an employee of a government client in the matter, both (i) carries professional liability insurance "substantially equivalent" to that required of Oregon lawyers; or (ii) has notified the lawyer's client in writing that the lawyer does not carry such insurance and that Oregon law requires Oregon lawyers to carry such insurance. The lawyer must include the administrative fee for her appearance established by the Oregon State Bar and proof of service to the arbitrator and other parties to this proceeding with the certification.

Pennsylvania

Pennsylvania Rule 5.5 permits temporary practice under the same circumstances as those outlined in the MR 5.5, but makes some substantive changes to other provisions.[262] First, in-house lawyers must obtain a limited license pursuant to Pennsylvania B.A.R. 302 in order to maintain a continuous practice in the state.[263] Second, Pennsylvania extends its temporary practice exceptions to lawyers in foreign jurisdictions.[264] Third, Pennsylvania adds the following sentence to the end of subsection (d)(1): "except that this paragraph (d) does not authorize a lawyer who is not admitted in this jurisdiction and who is employed by the Commonwealth, any of its political subdivisions or any of their organizational affiliates to provide legal services in this jurisdiction."[265] This last provision essentially requires lawyers employed by a governmental entity in Pennsylvania to be admitted in Pennsylvania.[266]

(ii) has notified the lawyer's client in writing that the lawyer does not have such insurance and that Oregon law requires Oregon lawyers to have such insurance. The certificate must be accompanied by the administrative fee for the appearance established by the Oregon State Bar and proof of service on the arbitrator and other parties to the proceeding." OR Rule 5.5.

[262] "[Pennsylvania] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules, Pa.B.A.R. 302 or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may, subject to the requirements of Pa.B.A.R. 302, provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission, except that this paragraph (d) does not authorize a lawyer who is not admitted in this jurisdiction and who is employed by the Commonwealth, any of its political subdivisions or any of their organizational affiliates to provide legal services in this jurisdiction; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction." PA Rule 5.5.

[263] See id.

[264] See PA Rule 5.5(c).

[265] See PA Rule 5.5(d)(1).

[266] See PA Rule 5.5, Comment 16.

Rhode Island

Rhode Island Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

South Carolina

South Carolina Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

South Dakota

South Dakota's rule mirrors the 2002 version of MR 5.5 in that it remains silent as to foreign lawyers. However, the rule contains additional provisions under subsections (c)(5) and (d)(2) which impose, respectively, a requirement that lawyers obtain a South Dakota sales tax license and tender all applicable taxes pursuant to Chapter 10-45 of the South Dakota code before practicing there.[267]

Tennessee

Tennessee Rule 5.5 allows for temporary practice under the same circumstances as the 2002 version of MR 5.5, but makes other changes.[268] First, the subsection permitting temporary legal services in alternative dispute resolutions and other matters not within the exceptions must be for an "existing" client, but the use of the

[267] See, e.g., SD Rule 5.5(c) (" . . . in all cases, the lawyer obtains a South Dakota sales tax license and tenders the applicable taxes pursuant to Chapter 10-45."); see SD Code 10-45 (providing guidelines for paying state sales tax).

[268] "[Tennessee] Rule 5.5. Unauthorized Practice of Law, Multijurisdictional Practice of Law

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's representation of an existing client in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.

(e) A lawyer authorized to provide legal services in this jurisdiction pursuant to paragraph (d)(1) of this Rule may also provide pro bono legal services in this jurisdiction, provided that these services are offered through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction and provided that these are services for which the forum does not require pro hac vice admission.

(f) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall advise the lawyer's client that the lawyer is not admitted to practice in Tennessee and shall obtain the client's informed consent to such representation.

(g) A lawyer providing legal services in Tennessee pursuant to paragraph (c) or (d) shall be deemed to have submitted himself or herself to personal jurisdiction in Tennessee for claims arising out of the lawyer's actions in providing such services in this state.

(h) A lawyer or law firm shall not employ or continue the employment of a disbarred or suspended lawyer as an attorney, legal consultant, law clerk, paralegal or in any other position of a quasi-legal nature." TN Rule 5.5.

adjective "existing" would not appear to be a substantive change from the Model Rule.[269] Second, Tennessee Rule 5.5(e) expressly allows an in-house-lawyer to provide *pro bono* legal services.[270] Third, Tennessee Rule 5.5(f) requires a lawyer who is providing legal services pursuant to Tennessee Rule 5.5(c) or (d) to obtain informed consent from the clients they are representing.[271] Fourth, Tennessee Rule 5.5(g) subjects lawyers to personal jurisdiction in Tennessee for claims arising out of the provision of legal services in Tennessee.[272] Fifth, Tennessee Rule 5.5(h) precludes lawyers from employing or continuing the employment of a disbarred or suspended attorney.[273]

Utah

Utah Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

Vermont

Vermont Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.,

Virginia

Virginia Rule 5.5, which markedly varies in structure from the Model Rule 5.5, permits "foreign lawyers" to temporarily practice in the state under the same circumstances as the Model Rule, as well as adding additional substantive provisions.[274] Notably, the term "foreign lawyers" is defined as including lawyers admitted in a U.S.

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[269] See TN Rule 5.5(c)(3).

[270] See TN Rule 5.5(e).

[271] See TN Rule 5.5(f).

[272] See TN Rule 5.5(g).

[273] See TN Rule 5.5(h).

[274] "[Virginia] Rule 5.5. Unauthorized Practice of Law; Multijurisdictional Practice of Law

(a) A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm, or professional corporation at any time on or after the date of the acts which resulted in suspension or revocation.

(b) A lawyer, law firm or professional corporation employing a lawyer as a consultant, law clerk, or legal assistant when that lawyer's license is suspended or revoked for professional misconduct shall not represent any client represented by the disciplined lawyer or by any lawyer with whom the disciplined lawyer practiced on or after the date of the acts which resulted in suspension or revocation.

(c) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(d) Foreign Lawyers:

(1) 'Foreign Lawyer' is a person authorized to practice law by the duly constituted and authorized governmental body of any State or Territory of the United States or the District of Columbia, or a foreign nation, but is neither licensed by the Supreme Court of Virginia or authorized under its rules to practice law generally in the Commonwealth of Virginia, nor disbarred or suspended from practice in any jurisdiction.

(2) A Foreign Lawyer shall not, except as authorized by these Rules or other law:

(i) establish an office or other systematic and continuous presence in Virginia for the practice of law, which may occur even if the Foreign Lawyer is not physically present in Virginia; or

(ii) hold out to the public or otherwise represent that the Foreign Lawyer is admitted to practice law in Virginia.

(3) A Foreign Lawyer shall inform the client and interested third parties in writing:

(i) that the lawyer is not admitted to practice law in Virginia;

(ii) the jurisdiction(s) in which the lawyer is licensed to practice; and

(iii) the lawyer's office address in the foreign jurisdiction.

(4) A Foreign Lawyer may, after informing the client as required in 3(i)-(iii) above, provide legal services on a temporary and occasional basis in Virginia that:

(i) are undertaken in association with a lawyer who is admitted to practice without limitation in Virginia or admitted under Part I of Rule 1A:5 of this Court and who actively participates in the matter;

jurisdiction or a foreign nation. Virginia Rule 5.5(a), like some other states, expressly precludes a lawyer or law firm from employing a suspended or disbarred lawyer in any capacity if such lawyer had been associated with the lawyer or law firm during or after the acts that led to disbarment or suspension.[275] Virginia Rule 5.5(b) precludes a lawyer or law firm from employing a suspended or disbarred lawyer as a law clerk or paralegal in matters in which such a lawyer represented clients.[276]

Most notably, Virginia's Rule 5.5(d)(2) categorically prohibits foreign lawyers from establishing offices (e.g., as in-house counsel or for federal practice) and from holding out to the public that she is licensed to practice in Virginia.[277] Subsection (d)(3) requires foreign lawyers engaging in temporary practice to inform clients and interested third parties in writing: (1) that the lawyer is not admitted to practice in Virginia; (2) the jurisdiction(s) in which the lawyer is admitted to practice; and (3) the address of the lawyer's office in the foreign jurisdiction.[278] Subsection (d)(4) outlines the circumstances under which a foreign lawyer may provide temporary legal services for the informed client, which is similar to those provided in Model Rule 5.5.[279]

Washington

Washington Rule 5.5 follows the 2002 version of MR 5.5 permitting multi-jurisdictional practice by non-admitted U.S. lawyers.

Wyoming

Wyoming's Rule 5.5 permits temporary practice, but deviates from the corresponding provisions of the 2002 version of MR 5.5. First, Wyoming omits subsection (e), pertaining to non-domestic lawyers serving as in-house counsel, and does not otherwise include non-domestic lawyers in any temporary or permanent practice exceptions.[280] Second, Wyoming's Rule 5.5 eliminates the phrase "reasonably expects to be so authorized" from its provision regarding lawyers providing legal services in a jurisdiction on a temporary basis.[281] Third, Wyoming

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(ii) are in or reasonably related to a pending or potential proceeding before a tribunal in Virginia or another jurisdiction, if the Foreign Lawyer, or a person the Foreign Lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(iii) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in Virginia or another jurisdiction, if the services arise out of or are reasonably related to the Foreign Lawyer's practice in a jurisdiction in which the Foreign Lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(iv) are not within paragraphs (4)(ii) or (4)(iii) and arise out of or are reasonably related to the representation of a client by the Foreign Lawyer in a jurisdiction in which the Foreign Lawyer is admitted to practice or, subject to the foregoing limitations, are governed primarily by international law.

(5) A foreign legal consultant practicing under Rule 1A:7 of this Court and a corporate counsel registrant practicing under Part II of Rule 1A:5 of this Court are not authorized to practice under this rule." VA Rule 5.5.

[275] See VA Rule 5.5(a).

[276] See VA Rule 5.5(b).

[277] See VA Rule 5.5(d)(2).

[278] See VA Rule 5.5(d)(3).

[279] See VA Rule 5.5(d)(4).

[280] Compare Model Rule 5.5(e).

[281] "[Wyoming] Rule 5.5. Unauthorized practice of law; multijurisdictional practice of law.

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding; or

eliminates subsection (c)(4) from its version of Model Rule 5.5, prohibiting lawyers from providing legal services that are reasonably related to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice.[282]

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Contributors to this chapter:

Cyrus D. Mehta (chair)

Alan Goldfarb (vice chair)

Craig Dobson

Maya Bangudi

Michele Carney

Reid Trautz

Maheen Taqui

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(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent of, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized by federal law, tribal law or other law or rule to provide in this jurisdiction." WY Rule 5.5

[282] Compare Model Rule 5.5(c)(4).

American Immigration Lawyers Association

AILA Ethics Compendium

ABA Model Rule 7.1-7.3

Communications Concerning a Lawyer's Services, Specific Rules, and Solicitation of Clients

Theo Liebmann, Reporter

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LAWYER ADVERTISING AND SOLICITATION: MODEL RULES 7.1, 7.2 & 7.3

Introduction and Background

Model Rules 7.1, 7.2, and 7.3 provide the ethical guidelines and constraints on lawyers' communications with the public about their legal services. The three Rules cover advertisements and direct solicitations seeking clients, but also other types of communication about the lawyer's services, including postcards, books, resumes and business cards.[1] Blogs, websites, on-line referral services, and myriad other forms of communication fall under the scope of the advertising rules as well. ***Given the broad range of communications regulated by the rules, and important distinctions among states, lawyers must be familiar with, and refer to, the rules in their jurisdiction prior to engaging in any means of conveying information about their legal services.***

The basic underlying rule on lawyer communications is simple—lawyers cannot make false or misleading statements about their legal services.[2] Rule 7.1 presents this deceptively straightforward premise, and adds a definition of "false or misleading" that hints at some of the challenges in applying the rule: "A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."[3] Practitioners communicating about their services therefore must not only avoid directly false or misleading statements, but must read their communications with an eye toward any omissions that might mislead a reader.

Rule 7.2 lays out a number of guardrails to help minimize the potential for non-compliance with the prohibition on false or misleading communications. First, the Rule creates conditions for permissible types of recommendation or referral arrangements. In general, lawyers may not provide anything "of value" to a person for recommending their services.[4] Any statement that "endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities" constitutes a recommendation.[5] By generally prohibiting payments for recommendations, the Rule seeks to avoid situations where the lawyer is enticing the recommender to embellish the facts or exaggerate results. Not every type of recommendation or referral arrangement, however, is impermissible. Lawyers are, among other things, allowed to pay reasonable costs of advertisements or similar communications, engage in non-exclusive reciprocal referral arrangements with lawyers or non-lawyers so long as the client is informed of the agreement, and provide "nominal" gifts of appreciation for recommendations if the gift is not intended as compensation.[6]

Rule 7.2 also sets out strict conditions for permissible statements about a lawyer's certification as a specialist. In immigration practice, where the complexity of the law will typically require highly specialized training and knowledge, communicating a certification to the public can be especially valuable. The Rule permits a lawyer to state or imply her certification in a specialty, but only if the certification is from an

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[1] *See, e.g., In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 2002 WL 1205695 (D. Minn. May 31, 2002) (false statements on postcards mailed to potential class members); *In re Smith,* 991 N.E.2d 106 (Ind. 2013) (false claims of certification as domestic lawyer mediator in book biography of lawyer-author); *Att'y Grievance Comm'n v. Narasimhan*, 92 A.3d 512 (Md. 2014) (misstatement of experience on lawyer's résumé); LA. ETHICS OP. 07-RPCC-013 (2007) (letterheads, business cards, telephone listings, and building-directory listings all covered by rules).

[2] MR 7.1. Note that the duty to be truthful is covered in a variety of other rules as well, including Rule 3.3 (Candor Toward the Tribunal), Rule 4.1 (Truthfulness in Statements to Others), and Rule 8.4 (Misconduct).

[3] Id.

[4] MR 7.2(b).

[5] MR 7.2, cmt. 2.

[6] MR 7.2(b).

approved organization and the name of that organization is identified.[7] The question of when more general statements about "specialization" are permitted varies considerably among jurisdictions, and is covered in the annotations and commentary section of this chapter.

Finally, Rule 7.2 requires any communication about the lawyer's services to include the name and contact information of at least one lawyer or law firm responsible for the content, ostensibly so that the advertising oversight agency can contact someone if necessary.[8]

The most invasive forms of communication, and therefore the most circumscribed, are direct, live, person-to-person communications soliciting employment from potential clients, including any face-to-face, live telephone, or other real-time visual or auditory mode of communication.[9] Rule 7.3 prohibits such forms of communication, with very specific and limited exceptions: (1) where pecuniary gain is not a significant motivation for the communication; (2) where the target is a lawyer; (3) where the target has a familial, close personal, or prior business or professional relationship with the lawyer; and (4) where the target routinely uses they type of legal services offered by the lawyer for business purposes.[10] Even these exceptions, however, do not apply if the target of the solicitation has made known that they do not want to be solicited, or if the solicitation involves coercion, duress or harassment.[11] Lawyers are also prohibited from using third parties to solicit employment on their behalf, unless it meets one of the enumerated exceptions.[12]

There are a number of challenges in complying with the advertising and solicitation rules. First, there are jurisdictional complications. The broad range of methods by which lawyers can communicate about their services, especially with social media and new technologies, creates difficult questions of which jurisdiction's ethical rules must be observed.

> *Example: Lawyer is an immigration practitioner who is licensed in State A, where she has her office. Lawyer has a website which states that accepts clients in State A, as well as contiguous State B. State A, consistent with Model Rule 7.2(b)(5), allows nominal gifts as an expression of gratitude to a recommender of the lawyer's services individual, so long as the gift is not intended nor expected to be a form of compensation for the recommendation. State B, however, contains no provision allowing nominal gifts.[13] One of Lawyer's clients from State B recommends a number of friends in State B who need assistance with immigration matters to Lawyer. Lawyer wants to send several bottles of fine wine to client to express her gratitude for the referrals. Can she do so?*

As this example illustrates, lawyers must navigate not just the advertising rules themselves, but also rules on multijurisdictional practice and choice of law. In this particular instance, Lawyer will have to look not just at the advertising rules in State A and State B, but also each state's rules on Choice of Law to ensure she complies with the law in each state that will apply to her conduct.[14]

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[7] MR 7.2(c).
[8] MR 7.2(d).
[9] MR 7.3, cmt. 2.
[10] MR 7.3(b).
[11] MR 7.3(c).
[12] *See, e.g.*, *In re O'Keefe*, 877 So. 2d 79 (La. 2004) (lawyer disbarred for paying "runners" to find and refer personal injury cases); *Miss. Bar v. Turnage*, 919 So. 2d 36 (Miss. 2005) (lawyer suspended for hiring former insurance salesperson to solicit clients for potential class action against insurer); MD. ETHICS OP. 98-30 (1998) (lawyer may not have bail bondsman distribute bondsman's business cards with lawyer's contact information printed on back). *See, generally*, MR 8.4(a) (prohibiting use of third persons to violate rules of professional conduct).
[13] *E.g.,* DEL. RULES OF PROF'L CONDUCT RULE 7.2.
[14] MR 8.5 (Disciplinary Authority; Choice of Law).

A second category of challenges in rule compliance is the broad terminology used in many provisions. Rule 7.2(b)(2) allows a lawyer to pay the "usual" charges of a qualified lawyer referral service. What is "usual"? Well, a "membership fee" is permitted in many jurisdictions, but a "marketing fee" rarely is.[15] Flat fees to a referral service are almost universally deemed acceptable, but paying a referral service a percentage of fees generated is typically not.[16] Similarly, Rule 7.3 allows solicitation where pecuniary gain for the lawyer or law firm is not a "significant motive" in seeking the employment. When does a lawyer's motivation for pecuniary gain cross the line into "significant"? In one jurisdiction providing ***free*** services, but with the hope the client will eventually use them for paid legal services, constituted a significant motive.[17] But, in another jurisdiction, a corporate defense lawyer who solicited former employees for ***paid*** legal services, for the stated purpose of protecting the interests of those employees, was deemed not to have pecuniary gain as a significant motive.[18] Practitioners will have to closely review how courts, ethical governing bodies, and ethical rules in their own jurisdictions have interpreted broad terms in order to ensure compliance with these and other provisions.

A third category of complications, as noted previously, is the effect that developing social media have on how the Rules are applied. The dramatic increase in blogging, firm websites, on-line referral services, lawyer rating sites, and many other forms of social media requires careful consideration of the policies behind the advertising and solicitation rules to apply them effectively to new situations. (Does a lawyer who discusses her recent legal victories on TikTok come under the purview of the advertising rules? See Hypothetical Number 6, *infra*.).

Finally, it is important to note that constitutional issues of freedom of speech can come into play in interpreting the Rules' application to various scenarios. For most of the history of the legal profession in the United States, all forms of advertising were absolutely prohibited. That changed in the early 1970s, as lawyers began to argue that the prohibitions undermined client choice, created barriers to the expansion of the bar beyond a mostly male and mostly white cadre of lawyers, and violated First Amendment free speech protections. In 1977, the Supreme Court ruled in *Bates v. Arizona* that legal ads are commercial speech, entitled to First Amendment protection, and that while states may be warranted in prohibiting false, deceptive, or misleading ads, regulations seeking to ban lawyers' commercial speech must directly advance a compelling government interest to withstand First Amendment scrutiny.[19] The very next year, the Court had a very different message in *Ohralik v. Ohio State Bar*, permitting outright bans on solicitation because of the intrusiveness of in-person nature of solicitation.[20] Since *Bates* and Ohralik, First Amendment considerations have continued to be a touchstone when advertising and solicitation rules have been challenged in courts.[21]

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[15] *E.g.*, D.C. ETHICS OP. 369 (2015) (permissible to pay qualified lawyer referral service percentage of fees earned if that is organization's "usual fee"); ILL. ETHICS OP. 15-04 (2015) (referral fee taken out of fees paid by client, not warded by court, may not be paid to nonprofit organization unless it qualifies as not-for-profit lawyer referral service); MO. INFORMAL ETHICS OP. 960126 (1996) (impermissible to give organization 10 percent of fees from cases it refers to lawyer unless organization is qualified, registered referral service); MONT. ETHICS OP. 960227 (1996) impermissible to participate in chamber of commerce referral network that awards "points" for leads because leads are not usual charges under rule); NEB. ETHICS OP. 14-01 (2014) (approving participation in nonprofit state bar association lawyer referral program, which requires payment of initial fee and percentage of fees generated by referrals to fund program's reasonable operating expenses).

[16] Id.

[17] R.I. ETHICS OP. 98-03 (1998).

[18] *Wells Fargo Bank, N.A. v. LaSalle Bank Nat'l Ass'n*, 2010 WL 1558554 (W.D. Okla. Apr. 19, 2010).

[19] 433 U.S. 350 (1977).

[20] 436 U.S. 447 (1978)

[21] *E.g.*, *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466 (1988) (state may ban all in-person solicitation by lawyers for profit regardless of its contents); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (state's ban on "advertising techniques

After presenting the text of Rules and Comments for 7.1, 7.2, and 7.3, this Chapter will address some of these nuances and challenges of the rules in more detail in Annotations & Commentary, and Hypotheticals. At end of chapter is a chart of key state variations for each Rule.

A. Text of Rules

ABA Model Rule 7.1 – Communications Concerning a Lawyer's Services

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Comment – Model Rule 7.1

[1] This Rule governs all communications about a lawyer's services, including advertising. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Misleading truthful statements are prohibited by this rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is misleading if a substantial likelihood exists that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation. A truthful statement is also misleading if presented in a way that creates a substantial likelihood that a reasonable person would believe the lawyer's communication requires that person to take further action when, in fact, no action is required.

[3] A communication that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated claim about a lawyer's or law firm's services or fees, or an unsubstantiated comparison of the lawyer's or law firm's services or fees with those of other lawyers or law firms, may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison or claim can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.

[4] It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. Rule 8.4(c). See also Rule 8.4(e) for the prohibition against stating or implying an ability to improperly influence a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.

[5] Firm names, letterhead and professional designations are communications concerning a lawyer's services. A firm may be designated by the names of all or some of its current members, by the names of deceased members where there has been a succession in the firm's identity or by a trade name if it is not false or misleading. A lawyer or law firm also may be designated by a distinctive website address, social

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[that] are no more than potentially misleading" is unconstitutional because of broad, "categorical nature of [those] prohibitions"); *Rubenstein v. Fla. Bar*, 72 F. Supp. 3d 1298 (S.D. Fla. 2014) (state bar guidelines prohibiting lawyers from advertising past results were not narrowly tailored to achieve bar's stated objectives). *See generally* David L. Hudson, Jr., *Attorney Advertising in the Litigators and Modern-Day America: The Continued Importance of the Public's Need for Legal Information*, 48 U. MEM. L. REV. 959 (Spring 2018).

media username or comparable professional designation that is not misleading. A law firm name or designation is misleading if it implies a connection with a government agency, with a deceased lawyer who was not a former member of the firm, with a lawyer not associated with the firm or a predecessor firm, with a nonlawyer or with a public or charitable legal services organization. If a firm uses a trade name that includes a geographical name such as "Springfield Legal Clinic," an express statement explaining that it is not a public legal aid organization may be required to avoid a misleading implication.

[6] A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction.

[7] Lawyers may not imply or hold themselves out as practicing together in one firm when they are not a firm, as defined in Rule 1.0(c), because to do so would be false and misleading.

[8] It is misleading to use the name of a lawyer holding a public office in the name of a law firm, or in communications on the law firm's behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.

ABA Model Rule 7.2 – Communications Concerning a Lawyer's Services: Specific Rules

(a) A lawyer may communicate information regarding the lawyer's services through any media.
(b) A lawyer shall not compensate, give or promise anything of value to a person for recommending the lawyer's services except that a lawyer may:

(1) pay the reasonable costs of advertisements or communications permitted by this Rule;
(2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service;
(3) pay for a law practice in accordance with Rule 1.17;
(4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if:
(i) the reciprocal referral agreement is not exclusive; and
(ii) the client is informed of the existence and nature of the agreement; and
(5) give nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services.

(c) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:

(1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate authority of the state or the District of Columbia or a U.S. Territory or that has been accredited by the American Bar Association; and
(2) the name of the certifying organization is clearly identified in the communication.

(d) Any communication made under this Rule must include the name and contact information of at least one lawyer or law firm responsible for its content.

Comment – Model Rule 7.2

[1] This Rule permits public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and other information that might invite the attention of those seeking legal assistance.

Paying Others to Recommend a Lawyer

[2] Except as permitted under paragraphs (b)(1)-(b)(5), lawyers are not permitted to pay others for recommending the lawyer's services. A communication contains a recommendation if it endorses or vouches for a lawyer's credentials, abilities, competence, character, or other professional qualities. Directory listings and group advertisements that list lawyers by practice area, without more, do not constitute impermissible "recommendations."

[3] Paragraph (b)(1) allows a lawyer to pay for advertising and communications permitted by this Rule, including the costs of print directory listings, on-line directory listings, newspaper ads, television and radio airtime, domain-name registrations, sponsorship fees, Internet-based advertisements, and group advertising. A lawyer may compensate employees, agents and vendors who are engaged to provide marketing or client development services, such as publicists, public-relations personnel, business-development staff, television and radio station employees or spokespersons and website designers.

[4] Paragraph (b)(5) permits lawyers to give nominal gifts as an expression of appreciation to a person for recommending the lawyer's services or referring a prospective client. The gift may not be more than a token item as might be given for holidays, or other ordinary social hospitality. A gift is prohibited if offered or given in consideration of any promise, agreement or understanding that such a gift would be forthcoming or that referrals would be made or encouraged in the future.

[5] A lawyer may pay others for generating client leads, such as Internet-based client leads, as long as the lead generator does not recommend the lawyer, any payment to the lead generator is consistent with Rules 1.5(e) (division of fees) and 5.4 (professional independence of the lawyer), and the lead generator's communications are consistent with Rule 7.1 (communications concerning a lawyer's services). To comply with Rule 7.1, a lawyer must not pay a lead generator that states, implies, or creates a reasonable impression that it is recommending the lawyer, is making the referral without payment from the lawyer, or has analyzed a person's legal problems when determining which lawyer should receive the referral. See Comment [2] (definition of "recommendation"). See also Rule 5.3 (duties of lawyers and law firms with respect to the conduct of nonlawyers); Rule 8.4(a) (duty to avoid violating the Rules through the acts of another).

[6] A lawyer may pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A legal service plan is a prepaid or group legal service plan or a similar delivery system that assists people who seek to secure legal representation. A lawyer referral service, on the other hand, is any organization that holds itself out to the public as a lawyer referral service. Qualified referral services are consumer-oriented organizations that provide unbiased referrals to lawyers with appropriate experience in the subject matter of the representation and afford other client protections, such as complaint procedures or malpractice insurance requirements. Consequently, this Rule only permits a lawyer to pay the usual charges of a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is one that is approved by an appropriate regulatory authority as affording adequate protections for the public. See, e.g., the American Bar Association's Model Supreme Court Rules Governing Lawyer Referral Services and Model Lawyer Referral and Information Service Quality Assurance Act.

[7] A lawyer who accepts assignments or referrals from a legal service plan or referrals from a lawyer referral service must act reasonably to assure that the activities of the plan or service are compatible with the lawyer's professional obligations. Legal service plans and lawyer referral services may communicate with the public, but such communication must be in conformity with these Rules. Thus, advertising must not be false or misleading, as would be the case if the communications of a group advertising program or a group legal services plan would mislead the public to think that it was a lawyer referral service sponsored by a state agency or bar association.

[8] A lawyer also may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer. Such reciprocal referral arrangements must not interfere with the lawyer's professional judgment as to making referrals or as to providing substantive legal services. See Rules 2.1 and 5.4(c). Except as provided in Rule 1.5(e), a lawyer who receives referrals from a lawyer or nonlawyer professional must not pay anything solely for the referral, but the lawyer does not violate paragraph (b) of this Rule by agreeing to refer clients to the other lawyer or nonlawyer professional, so long as the reciprocal referral agreement is not exclusive and the client is informed of the referral agreement. Conflicts of interest created by such arrangements are governed by Rule 1.7. Reciprocal referral agreements should not be of indefinite duration and should be reviewed periodically to determine whether they comply with these Rules. This Rule does not restrict referrals or divisions of revenues or net income among lawyers within firms comprised of multiple entities.

Communications about Fields of Practice

[9] Paragraph (c) of this Rule permits a lawyer to communicate that the lawyer does or does not practice in particular areas of law. A lawyer is generally permitted to state that the lawyer "concentrates in" or is a "specialist," practices a "specialty," or "specializes in" particular fields based on the lawyer's experience, specialized training or education, but such communications are subject to the "false and misleading" standard applied in Rule 7.1 to communications concerning a lawyer's services.

[10] The Patent and Trademark Office has a long-established policy of designating lawyers practicing before the Office. The designation of Admiralty practice also has a long historical tradition associated with maritime commerce and the federal courts. A lawyer's communications about these practice areas are not prohibited by this Rule.

[11] This Rule permits a lawyer to state that the lawyer is certified as a specialist in a field of law if such certification is granted by an organization approved by an appropriate authority of a state, the District of Columbia or a U.S. Territory or accredited by the American Bar Association or another organization, such as a state supreme court or a state bar association, that has been approved by the authority of the state, the District of Columbia or a U.S. Territory to accredit organizations that certify lawyers as specialists. Certification signifies that an objective entity has recognized an advanced degree of knowledge and experience in the specialty area greater than is suggested by general licensure to practice law. Certifying organizations may be expected to apply standards of experience, knowledge and proficiency to ensure that a lawyer's recognition as a specialist is meaningful and reliable. To ensure that consumers can obtain access to useful information about an organization granting certification, the name of the certifying organization must be included in any communication regarding the certification.

Required Contact Information

[12] This Rule requires that any communication about a lawyer or law firm's services include the name of, and contact information for, the lawyer or law firm. Contact information includes a website address, a telephone number, an email address or a physical office location.

ABA Model Rule 7.3 – Solicitation of Clients

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.
(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

(1) lawyer;

(2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or

(3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

(1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.

(e) Notwithstanding the prohibitions in this Rule, a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses live person-to-person contact to enroll members or sell subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.

Comment – Model Rule 7.3

[1] Paragraph (b) prohibits a lawyer from soliciting professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or the law firm's pecuniary gain. A lawyer's communication is not a solicitation if it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial, or if it is in response to a request for information or is automatically generated in response to electronic searches.

[2] "Live person-to-person contact" means in-person, face-to-face, live telephone and other real-time visual or auditory person-to-person communications where the person is subject to a direct personal encounter without time for reflection. Such person-to-person contact does not include chat rooms, text messages or other written communications that recipients may easily disregard. A potential for overreaching exists when a lawyer, seeking pecuniary gain, solicits a person known to be in need of legal services. This form of contact subjects a person to the private importuning of the trained advocate in a direct interpersonal encounter. The person, who may already feel overwhelmed by the circumstances giving rise to the need for legal services, may find it difficult to fully evaluate all available alternatives with reasoned judgment and appropriate self-interest in the face of the lawyer's presence and insistence upon an immediate response. The situation is fraught with the possibility of undue influence, intimidation, and overreaching.

[3] The potential for overreaching inherent in live person-to-person contact justifies its prohibition, since lawyers have alternative means of conveying necessary information. In particular, communications can be mailed or transmitted by email or other electronic means that do not violate other laws. These forms of communications make it possible for the public to be informed about the need for legal services, and about the qualifications of available lawyers and law firms, without subjecting the public to live person-to-person persuasion that may overwhelm a person's judgment.

[4] The contents of live person-to-person contact can be disputed and may not be subject to third-party scrutiny. Consequently, they are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading.

[5] There is far less likelihood that a lawyer would engage in overreaching against a former client, or a person with whom the lawyer has a close personal, family, business or professional relationship, or in situations in which the lawyer is motivated by considerations other than the lawyer's pecuniary gain. Nor is there a serious potential for overreaching when the person contacted is a lawyer or is known to routinely use the type of legal services involved for business purposes. Examples include persons who routinely hire outside counsel to represent the entity; entrepreneurs who regularly engage business, employment law or

intellectual property lawyers; small business proprietors who routinely hire lawyers for lease or contract issues; and other people who routinely retain lawyers for business transactions or formations. Paragraph (b) is not intended to prohibit a lawyer from participating in constitutionally protected activities of public or charitable legal-service organizations or bona fide political, social, civic, fraternal, employee or trade organizations whose purposes include providing or recommending legal services to their members or beneficiaries.

[6] A solicitation that contains false or misleading information within the meaning of Rule 7.1, that involves coercion, duress or harassment within the meaning of Rule 7.3 (c)(2), or that involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer within the meaning of Rule 7.3(c)(1) is prohibited. Live, person-to-person contact of individuals who may be especially vulnerable to coercion or duress is ordinarily not appropriate, for example, the elderly, those whose first language is not English, or the disabled.

[7] This rule does not prohibit a lawyer from contacting representatives of organizations or groups that may be interested in establishing a group or prepaid legal plan for their members, insureds, beneficiaries or other third parties for the purpose of informing such entities of the availability of and details concerning the plan or arrangement which the lawyer or lawyer's firm is willing to offer. This form of communication is not directed to people who are seeking legal services for themselves. Rather, it is usually addressed to an individual acting in a fiduciary capacity seeking a supplier of legal services for others who may, if they choose, become prospective clients of the lawyer. Under these circumstances, the activity which the lawyer undertakes in communicating with such representatives and the type of information transmitted to the individual are functionally similar to and serve the same purpose as advertising permitted under Rule 7.2.

[8] Communications authorized by law or ordered by a court or tribunal include a notice to potential members of a class in class action litigation.

[9] Paragraph (e) of this Rule permits a lawyer to participate with an organization which uses personal contact to enroll members for its group or prepaid legal service plan, provided that the personal contact is not undertaken by any lawyer who would be a provider of legal services through the plan. The organization must not be owned by or directed (whether as manager or otherwise) by any lawyer or law firm that participates in the plan. For example, paragraph (e) would not permit a lawyer to create an organization controlled directly or indirectly by the lawyer and use the organization for the person-to-person solicitation of legal employment of the lawyer through memberships in the plan or otherwise. The communication permitted by these organizations must not be directed to a person known to need legal services in a particular matter but must be designed to inform potential plan members generally of another means of affordable legal services. Lawyers who participate in a legal service plan must reasonably assure that the plan sponsors are in compliance with Rules 7.1, 7.2 and 7.3 (c).

B. Annotations and Commentary

The rules governing communication about lawyers' services involve terms and applications that can be tricky, especially because of new modes of communication being utilized by lawyers and law firms to advertise their services. As always, it is essential that lawyers look to guidance from decisions and opinions in their own jurisdiction, as well as jurisdictions that cover the geographic areas targeted by their communications, and check with local state bar associations when unsure of whether a particular communication passes muster in their jurisdiction. The topics covered below, and in the section on hypotheticals, address some of the more challenging areas of rule application.

What constitutes a "communication"?

All three advertising rules create guidelines for "communications" about a lawyer's services. Rule 7.1 prohibits false or misleading communications; Rule 7.2 provides more specific guidelines for communications through any media; and Rule 7.3 creates a general prohibition, with exceptions, on communications directed to a specific person soliciting legal employment. Given the prevalence of the term, the definition of "communication" is crucial to ensuring compliance with these rules. Thought not specifically defined anywhere in the Rules, there are clear indications in the comments of the intended broad reach of the term. Comment 1 to Rule 7.1 refers to a communication as "[w]hatever means are used to make known a lawyer's services…" Comment 1 to Rule 7.2 explicates in additional detail, referring to the following as permissible types of communication:

> public dissemination of information concerning a lawyer's or law firm's name, address, email address, website, and telephone number; the kinds of services the lawyer will undertake; the basis on which the lawyer's fees are determined, including prices for specific services and payment and credit arrangements; a lawyer's foreign language ability; names of references and, with their consent, names of clients regularly represented; and ***other information that might invite the attention of those seeking legal assistance***.[22]

The comments thus signal that the rules reach far beyond traditional advertisements and solicitations, and indeed Courts and bar opinions have generally accepted this broad view. The following types of information dissemination, among many others, have been found to be covered by the Rules that govern communications of a lawyer's services:

- Postcards to potential class members;[23]
- A biography in a lawyer-author's book;[24]
- A law firm's domain name;[25]
- Providing links to outside websites;[26]
- A resume;[27]
- Groupons;[28]
- A law firm's choice of telephone number;[29] and,
- A law firm's newsletter.[30]

Given this breadth, lawyers should check with their jurisdiction's governing rules and decisions, and with their jurisdiction's bar association, when they have any doubt about whether a particular type of information dissemination that might "invite attention of those seeking legal assistance" is covered.

What constitutes an impermissible solicitation?

Because of starkly different guidance regarding solicitations, as compared with other types of communications about legal services, lawyers must understand when a communication crosses the threshold into becoming an impermissible solicitation. Rule 7.3 defines solicitation as

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[22] MR 7.2, cmt. 1 [emphasis added].
[23] *In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig*. 2002 WL 1205695 (D. Minn. May 31, 2002).
[24] *In re Smith*, 91 N.E.2d 106 (Ind. 2013).
[25] N.Y. STATE ETHICS OP. 1021 (2014).
[26] ILL. ETHICS OP. 15-05 (2015).
[27] *Att'y Grievance Comm'n v. Narasimhan*, 92 A.D.3d 512 (Md. 2014).
[28] ABA FORMAL OP. 465 (2013).
[29] *In re Lord*, 807 S.E.2d 696 (S.C.2017) (lawyer's use of telephone number "844-FIXTICKET" found unethical as likely to create unjustified expectations).
[30] CONN. INFORMAL ETHICS OP. 01-07 (2001).

> a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.[31]

There are a number of key elements to the definition. *First,* it covers any live person-to-person contact initiated by a lawyer, or a third person on behalf of lawyer. Live person-to-person contact means any in-person face-to-face contact, any telephone contact, and any other real-time person-to-person visual or auditory contact where the person is "subject to a direct personal encounter without time for reflection."[32] Some items that explicitly do *not* fall under this definition include chat rooms, text messages and "other written communications that recipients may easily disregard." *Second,* covered contacts are only those that are directed toward a specific person that the lawyer knows (or reasonably should know) are in need of legal services in a specific matter. And *third,* the contact is only considered a solicitation if the lawyer, or a third person on behalf of the lawyer, offers to provide (or can reasonably be understood as offering to provide) legal services for a specific matter.

> *Example 1: Lawyer goes to a local agency that serves members of the community who are recent immigrants to the U.S. Lawyer presents information to a group of 25 community members on asylum eligibility and other pathways to adjusting status. At the end of the presentation, Lawyer says anyone who thinks they might have an asylum case can contact her office, and she gives out business cards to audience members.*

This is unlikely to be considered a solicitation. Though the provision of business cards could be reasonably understood by an individual audience member as offering to provide legal services for their specific matter, Lawyer does not seem to have knowledge of the legal needs of any specific individuals. To ensure there is no misunderstanding that could get her in trouble, Lawyer could make it clear she is not offering to provide legal services in any specific legal matter, merely providing contact information if audience members or someone they know might benefit from legal representation in an asylum matter.

Things can get especially complicated with electronic contacts, where the nature of what constitutes an impermissible "live person-to-person contact" becomes fuzzier. Generally, under the Model Rules, an electronic contact is permissible if it is in a form that "allows the reader to pause before responding and creates less pressure to immediately respond or respond at all, unlike a direct interpersonal encounter."[33] That ability of the reader to avoid the pressure of an immediate response is the touchstone for determining the permissibility of the contact.

> *Example 2: Lawyer A is an immigration lawyer. She sets up a website with a "chat room" function that allows her or a paralegal at her office to engage in real-time conversations with potential clients during certain hours. Is the chat function permissible? Can Lawyer A send emails to individuals who leave their information in the chat room during off when it is not being monitored?*

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[31] MR 7.3(a). *See also* ABA FORMAL OP. 501 (2022) (generally, a third party's solicitation on behalf of a lawyer is permissible when that person is not employed, retained or associated with the lawyer, nor directed by the lawyer to make statements on her behalf to particular potential clients).

[32] MR 7.3, cmt. 2.

[33] Revised Report 101, ABA Standing Committee on Ethics and Professional Responsibility (2018), available at https://www.americanbar.org/content/dam/aba/images/abanews/2018-AM-Resolutions/101.pdf. Note that before the 2018 amendments to Rule 7.3, real-time electronic contacts were uniformly prohibited. It is therefore important to see whether the rules of a lawyer's particular controlling jurisdictions have also been changed to conform with the Model Rule amendments.

Example 3: Lawyer B has a twitter account that he uses frequently to share news and opinions about developments in immigration law. The U.S. government makes an announcement that Temporary Protected Status (TPS) protections for current holders from Ukraine will be renewed. Lawyer B sends out a tweet that reads as follows – "TPS protections renewed for current holders from Ukraine! For a consult or representation on TPS renewal contact me at LawyerB@gmail.com or go to my website to schedule an appointment." Is the tweet permissible?

Example 4: Lawyer C focuses her work on family court matters and citizenship applications for individuals with challenging situations due to criminal histories, problems in family court or other issues. Lawyer C is working with Client, who has had some problems with orders of protection issues against him by his husband in family court. Client is impressed with Lawyer C's work, and tells Lawyer C he has a number of friends with similar problems. Client gives Lawyer C the cell phone numbers for three of his friends and suggests that Lawyer C call them via Face Time them to offer her legal services. Is it permissible for Lawyer C do so? Can she call them without Face Time? Can she text them?

For Example 2, there are no solicitation problems with the chat room conversations because the contact is not initiated by the lawyer. Rule 7.3 applies only to lawyer-initiated contact, and the way the chat room is set up, all contact is initiated by the prospective client. Lawyer A will still need to ensure that any advice, counseling or information provided in the chat by her or by her paralegal is accurate and complies with other rules regarding misleading communications.[34] In addition, if at any point a prospective client or visitor to the chat room indicates that she does ***not*** want to be solicited by Lawyer A, then Lawyer A must cease all solicitations.[35]

Lawyer B's tweet in Example 3 is also permissible, though for a different reason. The tweet is certainly a lawyer-initiated contact, but there is no pressure for an immediate response, and it is easily disregarded. The comments to Rule 7.3 explicitly exclude easily disregarded written communications from the definition of "live person-to-person contact," including texts and chat rooms.[36] As in Example 1, even though the tweet does not constitute an impermissible solicitation, Lawyer B must nevertheless ensure that the tweet complies with all other rules regarding communications. For example, if the tweet indicates that a failure to reach out immediately to Lawyer B will lead to imminent deportation, it will both be misleading and involve impermissible coercion or duress.[37]

In Example 4, neither a Face Time call nor a regular phone call is permissible. Both of these types of contact fall squarely under the definition of live person-to-person solicitation, and are only permissible if they are initiated where Lawyer C's pecuniary gain is not a significant motive; where the targets of the solicitation are lawyers themselves; or where the targets are family, or close personal or prior professional contacts.[38] In contrast, if Lawyer C reaches out via text to the numbers provided by Client, then the solicitation is permissible, because it does not involve a direct personal encounter that creates pressure for an immediate response.

What makes a communication "misleading"?

[34] *See* MR 1.18 (duties to prospective clients); 7.1 (prohibition on false statements regarding a lawyer's services).
[35] MR 7.3(c)(1).
[36] MR 7.3, cmt. 2.
[37] MR 7.1; 7.3(c)(2).
[38] MR 7.3(b).

The most emphatic prohibition in the advertising rules is the bar on false or misleading communications.[39] But what makes a communication "misleading" (rather than "false")? The definition in the comments is quite broad and, if a lawyer is careless, can lead to inadvertent violations of the Rule. Any omission that is substantially likely to make a reasonable person reach a conclusion about the lawyer's services that has no reasonable factual foundation constitutes a "misleading" communication, even where the statement itself is true.[40] For example, a truthful statement that leads a person to form an unjustified expectation for specific results, such as reporting an overall success rate for a firm without a disclaimer that results vary depending on individual circumstances, is misleading;[41] advertising legal fees without disclosing a client's responsibilities to pay costs is misleading;[42] and a statement that makes a reasonable person believe she has to take further action, when no further action is actually required, is misleading.[43]

> *Example 5: Lawyer A is an immigration lawyer with offices in Atlanta and New York City. Lawyer A does a wide variety of immigration applications for clients in both jurisdictions, but does defensive asylum applications only for her New York clients. The website for Lawyer A's practice truthfully states that Lawyer has offices in Atlanta and New York City, and has over a 50% success rate for her asylum cases in immigration court. Is it permissible to make this claim on the website?*
>
> *Example 6: Lawyer B works at a small immigration firm where he focuses his work on family-based immigration petitions. Lawyer B sends around emails and fliers to local agencies that work with immigrants. The emails and flyers accurately state that his firm only charges fees if the petitions are successful. Is this statement permissible?*

Although both statements are truthful, neither of them is permissible. In Example 5, the statement about Lawyer A's success rate could easily be understood to refer to her success rate in asylum cases in both Atlanta and New York City immigration courts, which is not accurate. Lawyer A could remedy this by noting that the grant rate was only for New York City cases and including a disclaimer (see below). In Example 6, the statement regarding "no success, no fee" does not disclose whether or not clients would be responsible for costs, such as filing fees, and therefore could easily be misunderstood to indicate that no payments of any kind are required unless a petition is successful.

Disclaimers

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[39] MR 7.1.
[40] MR 7.1, cmt. 2.
[41] MR 7.1, cmt. 3.
[42] Id.
[43] MR. 7.1, cmt. 2. *See also In re Defillo*, 762 S.E.2d 552 (S.C. 2014) (multiple misleading statements where Florida lawyer targeting advertising to South Carolina residents failed to note she was not admitted to South Carolina bar, referred to her firm's ""lawyers" and "attorneys" even though she was sole practitioner, and claimed her firm was "unique" merely because she and her staff spoke English and Spanish); ALA. ETHICS OP. 89-18 (1989) (commercial suggesting viewers call lawyer referral service rather than ""take a chance" on telephone book misleads viewers into believing participating lawyers' services are superior); MISS. ETHICS OP. 256 (2008) (lawyer's advertisement that he will donate part of fees to children's charities misleading because implies he is more charitable and more honest than other lawyers); PHILA. ETHICS OP. 95-12 (1995) (advertisement of ""Big city experience, small town service" misleading because implies lawyer's service better than other lawyers' services); MICH. INFORMAL ETHICS OP. CI-830 (1982) (misleading to send client newspaper clippings of out-of-state verdicts without disclaimer that similar results in state may not be possible); N.Y. STATE ETHICS OP. 1005 (2014) (slogans "I know how to win for you" and "unsurpassed litigation skills" used in lawyer advertising are misleading). *But see* R.I. ETHICS OP. 2015-03 (2015) (use of word "win" with lawyer's name in marketing slogan does not reasonably risk creating unjustified expectations). Hypotheticals 5, 6, 8, 9 and 11, *infra*, provide further examples of potentially misleading statements.

Disclaimers are a valuable tool for avoiding unintentionally misleading statements. In general, a disclaimer that each case is unique and previous fees and results should not be seen as a predictor of fees and outcomes for future cases, will protect against violations related to creating unjustified expectations or other otherwise misleading statements.[44] There are two important caveats. First, the disclaimer must cover the potentially misleading statement.

> *Example 7: Lawyer A, from Example 5 above, has made the accurate, but potentially misleading, claim about her asylum success rate on her website. The website includes information about the flat fee amounts charged for different types of cases. Lawyer A adds a disclaimer that states the following – "Please note that all fees are subject to change depending on the nature and difficulty of each individual case, and do not include additional costs that may be incurred."*

Such a disclaimer will address the potentially misleading aspect of published flat fee rates, but obviously not be sufficient to address the misleading aspect of the state about Lawyer A's asylum success rate. Second, a disclaimer must be visible and easily understood to be considered sufficient. Courts and bar opinions have found, for example, that disclaimers that are in small font size, less prominent than the claims being disclaimed, or available only after clicking through several links, are not adequate.[45] Thus, disclaimers are not inherently a panacea for potentially misleading statements, but rather must be prominent and precisely tailored to be deemed effective.

Law Firm Names, Letterheads & Websites

As noted previously, the rules relating to communications about legal services encompass more than simply advertisements or solicitations. Some of the most prevalent modes through which those communications occur are law firm names, professional letterheads, and lawyer and law firm websites. There are a number of potential pitfalls which can occur in these areas: unintentionally misleading the public about the services provided by the firm;[46] unintentionally misleading the public about the identity, qualifications, or connections of the lawyers at the firm;[47] and unintentionally misleading the public about the jurisdiction in which the lawyer or law firm can practice.[48]

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[44] MR 7.1, cmt. 3.

[45] WASH. ETHICS OP. 2206 (2010) (disclaimer text must appear in same font size as advertising text and cannot be minimized or obscured); *In re Foos*, 770 N.E.2d 335 (Ind. 2002) (small-type disclaimer not sufficient to address misleading information in standard type); OKLA. ETHICS OP. 320 (2004) (ad with amounts awarded in jury verdicts only permissible if accompanied by equally prominent disclaimer); S.C. ETHICS OP. 12-03 (2012) (buried, small-type disclaimers on legal services website were ineffective); D.C. ETHICS OP. 302 (2000) (when appearing on websites, disclaimers should not be buried in links several clicks removed from main page).

[46] *See, e.g., In re Shapiro*, 656 N.Y.S.2d 80 (App. Div. 1996) (lawyer's listing in legal directories as ""Accident Legal Clinic of Shapiro and Shapiro" misleading because lawyer's practice not limited to accident claims).

[47] *E.g.*, ABA FORMAL ETHICS OP. 94-388 (1994) (law firms that form network with firms in other cities may not mislead clients into thinking each firm has access to each other's lawyers; separate network members may not share same firm name); CAL. FORMAL ETHICS OP. 04-167 (2004) (firm's name, "Workers Compensation Relief Center," misleading because implies affiliation with governmental agency); CONN. INFORMAL ETHICS OP. 95-22 (1995) ("[X] County Legal Services" misleading without disclaimer of any connection with either government agency or public or charitable legal services organization).

[48] *E.g.*, ARK. ETHICS OP. 2004-03 (2004) (firm employing lawyer not licensed in firm's resident state may still list lawyer on letterhead if jurisdictional limitation noted); CONN. INFORMAL ETHICS OP. 83-3 (1983) (lawyers admitted in different states who form partnership may include both names in partnership's name, but letterhead and other listings must indicate jurisdictional limitations); ILL. ETHICS OP. 14-04 (2014) (out-of-state personal injury lawyer's mail solicitations to Illinois residents must state in which jurisdictions lawyer licensed); MICH. INFORMAL ETHICS

Example 8: Lawyers A and B are recent graduates from City Law School, and are starting an immigration law firm. Rather than use their own names, Lawyers A and B decide to honor their immigration law teacher at law school, Professor Z, by naming their firm the "Professor Z Law Firm." Is the name permissible?

Although Professor Z is doubtless flattered, hopefully she will inform her former students that the law firm is not permissible. The public could incorrectly but quite reasonably believe that Professor Z is a member of a firm that bears her name, or even simply – again incorrectly – associate her reputation and level of expertise with the firm. Even using a more generic name such as "City Law School Graduate Law Firm" will not be permissible because, although completely accurate, it could reasonably but incorrectly be interpreted as a more formal association with City Law School. Other terminology in firm names that can be problematic is wording that implies an association with pro bono organizations or judges, the use of names of former members of a firm (or members of the firm who no longer or licensed to practice), or even using a plural form of "lawyer" for a solo practice.[49]

As noted above, disclaimers, if sufficiently prominent and precise, can preclude findings that a firm name is misleading. In particular, if a law practice has any kind of presence in jurisdictions where some of the firm's lawyers are not licensed, all letterheads, business cards, websites and other forms of communication about the firm's services should indicate where those lawyers are licensed to practice.

Referral Services

Lawyers are generally permitted to pay the costs of qualified lawyer referral services, including on line referral services.[50] It is the lawyer's responsibility to make reasonable efforts to ensure that any referral service she uses comply with ethical rules regarding misleading communications.[51] In addition, to be considered "qualified," the service must be a "consumer-oriented organization" that provides "unbiased referrals to lawyers with appropriate experience," affords appropriate client protections, and has been approved by an appropriate regulatory authority.[52] The most challenging area for lawyers is ensuring that any arrangement with a referral service cannot be deemed a payment for a recommendation, which is not permissible under the rules, but rather simply a payment of the "usual" charges for the service. Where that line is will depend predominantly on how the fees are determined.

Example 9: Lawyer A would like to sign up for an on-line referral service called "LawyerList". LawyerList will indicate that Lawyer A's area of practice is immigration law, will list how many years she has been in practice and where she went to school, and will provide her contact information. In return, Lawyer A must pay LawyerList a monthly fee, as well as a marketing fee

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OP. RI-353 (2012) (law firm name may contain name of lawyer not admitted to practice in Michigan if precautions taken to avoid misleading public, such as noting lawyer's jurisdictional limitations on firm letterhead); N.Y. STATE ETHICS OP. 704 (1998) (names of lawyers listed on letterhead of multijurisdictional firms must be accompanied by notation of any jurisdictional limitations on ability to practice); OHIO ETHICS OP. 2008-1 (2008) (Ohio lawyer may be named as "Of Counsel" on out-of-state firm's letterhead but jurisdictional limitations must be indicated on letterhead); PHILA. ETHICS OP. 2005-14 (2005) (lawyer not licensed in Pennsylvania may practice federal immigration law in Pennsylvania but must indicate lack of Pennsylvania license in all professional communications); UTAH ETHICS OP. 00-02 (2000) (lawyer on inactive status in another jurisdiction may not list herself as "also admitted" or "licensed" there without further explanation)

[49] Id,; *see also* nn. 46-7, *supra*.

[50] MR 7.2(b)(2).

[51] MR 7.2, cmt. 7.

[52] MR 7.2, cmt. 6.

that is based on a small percentage of the fees generated from LawyerList referred clients. Can Lawyer A sign up for the service?

Lawyer A cannot use LawyerList because of the fee arrangement. The listing of Lawyer A's area of practice, and facts about her experience and contact information, are all allowed, so long as they are truthful. However, a fee arrangement that provides financial compensation to the referral service based on actual fees generated by the lawyer is not permissible because it is considered a payment for the referrals generated, rather than for the referral service generally, and therefore do not constitute the "usual" charges of advertising.[53]

Claims of Specialization and Expertise

It can be especially valuable for immigration lawyers to communicate their expertise in immigration law, as well as any specializations within immigration law. The Rules permit such claims, but there are important guardrails. In general, a lawyer can say she specializes in or has expertise in a particular type of law so long as it is an accurate reflection of her education, experience and training; a lawyer may not, however, say she is "certified" in an area of law unless she has been certified by an approved organization and the name of that organization is clearly identified.[54] Note that some jurisdictions continue to prohibit even claims of specialization or expertise that do not have the imprimatur of an official certifying agency.

C. Hypotheticals

Hypothetical One: Transparency and Specialization

Lawyer Posey has moved from State A, where she is licensed, to State B, where she is not licensed. State B's ethics rules allow for the practice of law within the state in matters involving federal administrative agencies though the attorney is not licensed in State B.

Posey introduces herself to her new neighbors and passes them her business card. She tells them that she is an expert in all areas of immigration law. Her business card gives her local business address and says that she is an immigration expert, but does not say where she is licensed. Are Posey's interactions with her neighbors about her legal practice permissible?

Analysis:

The initial question here is whether or not Posey's communications to her new neighbors about her practice constitute solicitation – which would incur stricter guardrails than other communications – or not. Because Posey does not know of any specific immigration matter in which her neighbors need legal services, but rather is passing around her cards as a way of advertising her services more generally, this is clearly not a solicitation. Posey nevertheless must abide by the more general rules that cover any communication about her services, and two in particular are potentially troublesome here. First, Posey should ensure her business card indicates the jurisdictions in which she is licensed to practice law. Otherwise, she risks inadvertently

[53] *See, e.g.*, OHIO SUP. CT. ETHICS OP. 2016-3 (2016) (online lawyer referral service's "marketing fee" based on fees generated by referrals is impermissible); W. VA. ETHICS OP. 2018-01 (2018) (lawyer-client matching arrangement in which payments to matching company are calculated based on number of matters and amount of fees generated is impermissible payment in exchange for referrals). *See generally* N.J. ADVERTISING ETHICS OP. 43 (2011). *See also* https://www.hinshawlaw.com/newsroom-updates-avvo-shuts-down-its-legal-services-product-in-wake-of-ethics-opinions-warning-attorneys-not-to-participate.html (recounting the closing of Avvo's legal services product under pressure due to its arguably impermissible referral fee arrangement).

[54] MR 7.2(c); MR 7.2, cmts. 9, 11.

misrepresenting that she is licensed to practice in State B beyond just federal administrative agencies. Second, Posey should be cautious about claiming that she is an expert in immigration law unless she truly is an expert in all areas of immigration law (which seems unlikely), and she has some certification as a specialist from an "approved authority." Jurisdictions vary on how much latitude is given to lawyers to claim an expertise or specialty, as some states forbid those claims without certification and others do not.[55] Posey could certainly list immigration law as her area of practice on the business card; the potential problem arises when she refers to herself as an expert. As with any lawyer, if Posey is contacted as the result of her outreach, she should conduct an intake, analyze the facts, and determine whether she is competent to handle the matter.

Hypothetical Two: The Immigration Guru

Lawyer Posey is a licensed attorney with some immigration law experience. Separate from her law practice, Posey moderates a chatroom called "Healing Your Inner Wanderer." She describes herself on the chatroom site as an "immigration guru" who has counseled many migrants about their dislocation trauma. The discussion in the chatroom focuses on healing the psychological stress of geographic relocation. Posey provides her contact information in the chatroom and several attendees with visa issues contact her for representation. Has Posey committed any ethical violations by hosting the chatroom? Can she take the cases of the attendees who contact her?

Analysis:

Even if she is not holding herself out as a lawyer in the chatroom, Posey must comply with the general prohibition on deceit, fraud and misrepresentation by lawyers either within our outside of the practice of law.[56] If Posey really has counseled traumatized migrants, her statement is neither false nor misleading, and there are therefore no problems with her hosting the chatroom. If Posey holds herself out on the chatroom as a lawyer, however, then the ethical rules regarding communication about a lawyer's services apply, even if the purpose of the chatroom site itself is non-legal.[57] Posey would therefore have to ensure that information on the chatroom site about her legal services is neither false or misleading, and that she has complied with her jurisdiction's rules about indicating a specialty, including contact information, etc. With respect to accepting the cases of the chatroom attendees who contact her, so long as Posey is competent to handle the matters and there are no conflict of interest or other similar issues, then she can take the cases.

Hypothetical Three: A Nice Dinner

Lawyer Posey's sister-in-law, Rosey, has made a wonderful impression on her neighbors, the Singhs, who have been in the U.S. on an H-1B visa for several years. Rosey tells the Singhs that her sister-in-law Posey is an immigration lawyer. The Singhs trust everything that Rosey says so they believe that Posey will be a wonderful attorney. Rosey invites the Singhs over for coffee to meet Posey. Mr. and Mrs. Singh tell Posey that they want to get a new visa through their brother's start-up business. Not knowing anything about this type of case but confident in her own abilities, Posey agrees to represent them. Posey rewards Rosey for

[55] *See, e.g.,* ARIZ. ETHICS OP. 2000-01 (2000) (firm may not advertise it specializes in particular area of law unless a member is certified in area); ILL. ETHICS OP. 96-8 (1997) (law firm may use terminology that it's practice is "concentrating" in intellectual property law, but may not state it "specializes" where no member is admitted to practice in Patent and Trademark Office); N.Y. STATE ETHICS OP. 1100 (2016) (lawyer may not advertise accreditation as estate planner from private national association because program has not been approved by ABA); N.J. ADVERTISING ETHICS OP. 45 (2018) (only lawyers certified by state supreme court or ABA-approved organization can call themselves "experts"); W. VA. ETHICS OP. 2015-02 (2015) (West Virginia does not recognize or permit any kind of claims of specialization).

[56] MR 8.4(c).

[57] MR 7.1, cmt. 1.

the referral by taking her out to a pricey dinner. Has Posey committed an ethical violation by taking the case? By taking her sister out to dinner as a thank you?

Analysis:

Because Posey does not know anything about the type of case she is being asked to handle for the Singhs, she may not be competent to handle the representation. Depending on the urgency and complexity of the case, she may nevertheless be able to take the case if she plans to gain the necessary competency through additional study and research, or through associating with a more experienced lawyer. Any agreement for representation of the Singhs would need to make them aware of those plans and any additional costs or delays the Singhs may incur.

With regard to the pricey dinner, Posey is not permitted to give anything of value to Rosey for recommending her services, but is permitted to five nominal gifts as an expression of appreciation that are "neither intended nor reasonably expected to be a form of compensation for recommending" her services. In most jurisdictions, a dinner less than $100 is likely to be considered nominal. In addition, and crucially, the dinner payment here does not appear to be for the purpose of obtaining referrals, but rather as an expression of gratitude for a referral that was provided without expectation of any payment. Posey should nevertheless look at the rule and opinions in her jurisdiction before offering to pay for dinner as a sign of appreciation.

Hypothetical Four: A Double Standard for an "Immigration Specialist"?

Penelope, a lawyer licensed in Massachusetts only, practices federally authorized immigration law nationwide from her office in Boston, Massachusetts. She states on her website that she welcomes federal immigration clients in all 50 states. Penelope is a leader in the field of immigration law, and while she is not a certified specialist, she is regarded by her peers as an outstanding practitioner. As permitted under Massachusetts Rule of Professional Conduct 7.4(b), she states on her website that she is an "immigration specialist." Penelope has taken on a significant number of immigration clients in South Carolina, and recently hired a tech consultant to assist her with search engine optimization to attract even more clients in the state. Several lawyers based in South Carolina have noticed a decrease in their business and discovered Penelope's website during competition research. These lawyers were upset to learn that Penelope refers to herself as a specialist when, under South Carolina Rule of Professional Conduct 7.4(b), they are explicitly prohibited from referring to themselves as a "specialist" or "expert" or "authority" without a specifically approved certification. The South Carolina lawyers report Penelope to the South Carolina bar. Are the lawyers correct that Penelope has committed an ethical violation?

Analysis:

There is a strong likelihood that Penelope has committed an ethical violation. Penelope is federally authorized to practice immigration law nationwide, including in South Carolina, and under the ethical rules in her home state of Massachusetts, she is permitted to refer to herself as a "specialist."[58] However, South Carolina's rules explicitly prohibit that language without a certification from a state-approved body, which is not the case here. The issue is further complicated by the fact that under the CFR, although lawyers before immigration courts and agencies are prohibited from even implying that they are a ***certified*** specialist, Penelope's reference to herself merely as a "specialist" is almost certainly permitted based upon her experience and expertise. The question then becomes, the ethical rules of which jurisdiction should apply – South Carolina, or Massachusetts, or the CFR? Here, the lawyers reported the case to the South Carolina

[58] Note that under Massachusetts Rule 7.4(c), even in Massachusetts Penelope could not refer to herself as a "certified specialist" without a certifying from an approved certifying organization.

bar, and under its rules on jurisdiction and choice of law, South Carolina will apply its own rules. In fact, South Carolina' Rule 8.5 states clearly that:

> [a]ny communication made for the purpose of soliciting clients from within South Carolina or advertising a lawyer's services in South Carolina shall be deemed to have its predominant effect within South Carolina and shall be subject to the provisions of Rules 7.1 through 7.5 of the Rules of Professional Conduct and Rule 418, SCACR, regardless of the jurisdiction in which the lawyer is licensed or in which the matter may be pending.

Penelope could try to argue that the federal rules governing practice for immigration practitioners in the CFR should apply, rather than the South Carolina rules. Given that the advertising here is not conduct in connection with any specific "matter pending before a tribunal," however, it is much more likely that South Carolina's rules would apply as that is the jurisdiction where "the lawyer's conduct occurred."[59] Regardless, the safer course of action would clearly be for Penelope to forego referring to herself as an immigration specialist if she wanted to take cases in South Carolina.

Hypothetical Five: Firm Names, Referral Arrangements, Lavish Gifts and Advertising Your Fees

"The Legal Eagles" law firm is a sole practice owned by attorney Sheila. Sheila makes an agreement with a local accounting firm where she pays the accounting firm for each referral. Tired of paying money for every referral, Sheila changes the arrangement so that both the accounting firm and Sheila each refer clients to each other without a referral fee. Pleased by how well the new agreement is working, Sheila sends a lavish gift to the accounting firm at the holidays to express her gratitude. In a final end of the year push for business, Sheila decides to advertise and, in her advertisement, she publishes her fees.

Does any of Sheila's conduct violate any rules of professional conduct?

Analysis:

Sheila's communications about her legal services raise four ethical questions:

- Is the trade name she is using for her firm permissible? (Probably not.)
- Are either of the referral arrangements with the accounting firm permissible? (Yes, but only the one with cross-referrals.)
- Is the gift to the accounting firm permissible? (Probably not.)
- Is publishing her fees permissible? (Probably.)

A trade name for a law firm is permissible under Rule 7.1 so long as it not misleading. Here the name "The Legal Eagles" could be deemed misleading because Sheila appears to be the only attorney who is a member of the firm and making the name plural implies that more than one attorney works at the firm.

Directly paying the accounting firm for referrals is a clear violation of Rule 7.2, which prohibits compensating a person for recommending the lawyer's services with certain exceptions, none of which apply here. On the other hand, a lawyer and another lawyer or non-lawyer can make an agreement to make referrals to one another as long as the agreement is not exclusive and the client is informed of the nature and existence of the agreement. Therefore, so long as Sheila makes her clients aware of the cross-referral agreement, and the agreement is non-exclusive, the arrangement is ethical.

[59] See MR 8.5(b)(2).

Sheila's lavish gift to the accounting firm likely violates Rule 7.2(b)(5) which only allows attorneys to give ***nominal*** gifts of appreciation for recommending the lawyer's services.

Finally, Sheila publishing her fee is permissible so long as it is not misleading. She cannot, for example, indicate that a client only has to pay fees if she wins the case, but fail to mention that the client will be responsible for representation-related costs. To be safe, Sheila should consider a disclaimer indicating that fee rates may vary depending on the nature, complexity or duration of a case.[60]

Hypothetical Six: "Winning Ugly" Advertising – Unethical or Just Embarrassing?

Sarah is an immigration lawyer. She watches her teenage children's obsession with TikTok and hatches a brilliant idea to advertise on TikTok. In consultation with her expert children, Sarah grabs a stack of approval notices for her clients and her kids videotape her dancing on the notices to the song Winning Ugly by the Rolling Stones. Sarah's culminating act is singing the final chorus line "and we're winning, winning ugly" while throwing another huge stack of approval notices in the air. Does Sarah's advertisement on TikTok, other than embarrassing her children, violate any rules of professional conduct?

Analysis:

Under Rule 7.2, advertising or communicating information about a lawyer's services is generally permitted through any form of media, including TikTok. However, those communications must stay within the same guardrails as more traditional forms of communication. Here, Sarah's dance is unlikely to run afoul of any of those guardrails, though some might argue that only throwing approval notices is misleading by implying she is always successful, or by suggesting that she would do anything to win even if that meant dishonest or illegal conduct. This writer feels as though the public is sufficiently media savvy (cynical?) not to make that mistaken assumption. More importantly, Sarah would need to make sure that none of her client information was visible on the video or she would be in violation of her confidentiality obligations to her client under Rule 1.6.

Hypothetical Seven: Overpromising

Attorney Amy has many clients who entered the United States without inspection and are therefore unable to adjust status in the U.S. despite being married to a U.S. citizen. Amy is extremely frustrated on behalf of these clients, many of whom fear returning to their home country for a visa interview. Amy has successfully represented many clients in VAWA adjustment of status cases, which are exempt from the EWI bar, and believes more potential clients would qualify for VAWA adjustment if they knew about this option. In an effort to broaden her client base, she runs advertisements with the following language:

> The Law Office of Attorney Amy successfully obtains residency for individuals who entered without permission via adjustment of status. Where other lawyers may tell you that you must leave the U.S. to get your residency, the Law Office of Attorney Amy may be able to help you so you can get your lawful residency AND stay in the U.S, with your family. If you are married to a U.S. citizen or lawful permanent resident, contact our office today so that Attorney Amy can help you obtain a work permit and lawful residency within two years.

Does the language in the advertisement here violate Rule 7.1?

Analysis:

[60] See MR 7.1, cmt. 3.

Though well-intentioned, unfortunately this advertisement is misleading and therefore violates Rule 7.1. A potential client who entered the U.S. without inspection could easily believe that Amy can get them a work permit and residency without them needing to leave the U.S., ***regardless of whether they were a VAWA applicant or qualified for another type of application that waived the EWI bar***. Amy could easily fix the advertisement by adding a disclaimer that said only certain types of situations would permit a person who entered EWI to remain in the country pending the adjustment application, and each case needs to be assessed individually. In addition, Amy's advertisement compares services with those of other lawyers, apparently without justification or substantiation, which is also a violation of Rule 7.1 (comment 3).

Hypothetical Eight: Social Media Profiles

As a way to cut costs and also to harness the vast opportunities that social media provides for free and lower cost exposure, Attorney Jacob decides to become active on Facebook, Twitter, Instagram, and TikTok. He creates a profile for his law office and a personal profile, both of which are open to public views. Across all platforms, Jacob posts live videos where he discusses new developments in immigration law and answers questions posted by viewers. He frequently interacts with clients and potential clients on all platforms, answering case specific questions, answering general questions about immigration law, and sharing articles or interesting cases. Jacob frequently reports his case successes with language akin to "Received 10 work permits in the mail today! Just another successful day at our firm. What a great day for our clients!" When he answers a case question from a non-client, he never fails to mention he does that type of case, gives his phone number, and recommends they call him to set up a consultation.

Are Jacob's social media postings and interactions permissible?

Analysis:

To the extent that any of Jacob's posts are communicating about his legal services, they are subject to Rules 7.1 and 7.2. This includes any post or comment in which he states that he handles legal matters, and regardless of whether the post or comment is on a professional or personal social media platform. Posting about case successes, for example, could certainly be subject to the Rule. Much would depend on whether the posting is public (as it is here) or private, and the nature of the post. Telling your private Facebook friends about your great day at work where you got ten work permits for clients in one day is unlikely to be deemed a communication about the lawyer's services. Describing those victories on public account such as TikTok or Twitter, however, are more likely to be deemed a communication about the services as understood in the Rules, as they invite attention those seeking legal assistance.

If the postings are deemed communications regarding Jacob's services, then he will have to ensure that there is nothing misleading in them. Posting about receiving 10 work permit approvals without further details, for example, could that be considered misleading; it could imply that because it's normal in his office, any client could expect the same.

There are a host of other potential problems here, though they are not explicitly highlighted in the scenario – Are Jacob's communications with clients and prospective clients sufficiently secure to ensure confidentiality is protected? Is he ensuring that there are no conflicts problems with the various client and prospective client? Is he making clear the limited scope of his interaction with clients and prospective clients? Jacob might want to read ABA Formal Opinions 477, 483, 495, and 498, all of which deal with various aspects of these questions.

Hypothetical Nine: The Boasting Business Immigration Lawyer

Malia is an attorney whose practice focuses on employment-sponsored visas. She began working at a multinational law firm immediate upon her admission to the bar. After one year, she left that firm to start her solo practice and is advertising her new firm. One of her advertisements reads as follows: "Attorney Malia is a superstar – she has filed 3,000 H-1B petitions and has a 100% approval rate. Only 10% of attorneys nationally enjoy that kind of success rate. Malia can get you an approval even for the toughest of cases, even if you don't have a bachelor's degree."

Does Malia's advertisement violate any rules under the ABA Model Rules?

Analysis:

Malia's advertisement would likely be found to be misleading and in violation of Rule 7.1. If her statement that she has filed 3,000 H-1B petitions in one year is false, that would certainly be in violation of Rule 7.1. She would also be in violation of Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Assuming for purposes of this hypothetical that she has indeed filed 3,000 H-1B petitions and secured approvals on all of them, her statement about a 100% approval rate would still be in violation of the rules because it could lead a reasonable person to form an expectation that their case would be approved, even in the most difficult of cases. Furthermore, Comment 3 to Rule 7.1 indicates that an unsubstantiated comparison of the lawyer's services with those of other lawyers or law firms may be misleading. She may be able to avoid violating Rule 7.1 by adding a disclaimer or qualifying language to avoid creating an unjustified expectation, such as "Attorney Malia's 100% approval rate applies only to H-1Bs for software engineers with bachelor's degrees in Computer Science."

Even if she adds the disclaimer, however, Malia would be found to be in violation of the rules based on her final statement that she can get an H-1B approval even if one does not have a bachelor's degree. Whether one is eligible for H-1B classification or whether the case would ultimately be approved depends on the specific facts of the case. Her statement would likely mislead a reasonable person into believing that she can work magic on any H-1B filing.

Hypothetical Ten: The Unintended Lawyer-Client Relationship

Talia is using various social media platforms to advertise her new solo law practice. On her profile page, Talia has a disclaimer that states that the answers to questions posted on the site are for informational purposes only and do not form an attorney-client relationship with the inquirer.

Talia receives an inquiry from someone who says that he is a model on an H-1B visa. He discloses online that he is leaving his current company and that his new prospective employer has filed a new O-1 petition for him, but that they received a Request for Evidence. He is working with counsel but wants a second opinion from Talia on the strength of the O-1 approval in order to decide whether to leave the H-1B employment. Although the post is anonymous, Talia is excited that this might be a famous model and asks for some additional details about what documents he has submitted. She quickly reviews his documents to provide him with the best advice possible. She advises that he has a strong O-1 case and that it should be approved. The model is impressed with Talia's analysis and decides to fire the counsel that was working on his RFE response. One week before the due date, he emails Talia and asks her to work on the RFE response.

At this point, Talia asks the model for specific information as to his current H-1B employer and future O-1 employer. She learns that the current H-1B employer is a client that she represents in other H-1B matters.

Question 1: What are Talia's obligations to the model?

Analysis:

Talia's disclaimer attempts to avoid forming an attorney-client relationship with inquirers on the online platform. A lawyer's disclaimer should be clear and unambiguous to an unsophisticated lay person to afford any protection to the lawyer. Here, when Talia asked the model to provide more details about his O-1 case, without clear and reasonably understandable warnings about the scope of her obligations, she triggered prospective client relationship with the model. Rule 1.18 Comment 2 indicates that a person becomes a prospective client when he "consults" with the lawyer about the possibility of forming a lawyer-client relationship. Despite Talia's initial disclaimer, the model is seeking advice on the course of action he should take and given Talia's request for additional documents and the analysis she provided, he has developed a reasonable expectation that Talia is open to a future attorney-client engagement. Where Rule 1.18 is triggered, Talia now has the obligation to keep his information confidential and to avoid impermissible conflicts of interest with other clients or prospective clients.

Question 2: How could Talia have navigated the conflict of interest?

Analysis:

Prior to soliciting more details about the model's case, Talia should have conducted a conflict check under Rule 1.18 Comment 3. She would have learned that Company A is her current client and declined to communicate further with the model about his O-1 case. In her current situation, Talia must decline from representing the model because his case and her representation of Company A are diametrically opposed. Even worse, when she advised the model that he has a strong enough O-1 case with the new employer, she violated her duty to her current client Company A to avoid conflicts under Rule 1.7. With that advice, she was effectively suggesting to the model that he can leave his current H-1B employment with Talia's existing client. Talia will have to report this violation to Company A so they can determine what action, if any, to take with regard both to the representation, and to reporting her to her jurisdiction's governing ethical body. In reporting the violation to Company A, Talia can only disclose information regarding the prospective client (the model) to the extent reasonably necessary to ensure Company A can make an informed decision about continuing the representation.

Hypothetical Eleven: One of "America's Best Lawyers"?

Virgil is a paying member of the "Americas Best Lawyers" directory. A few months ago, he decided to start his own immigration law practice after leaving a prior oil and gas-based law firm. Based on a review from a friend and colleague for whom he covers a USCIS appearance, Virgil receives a notice from the "Americas Best Lawyers" directory that he achieved a "Five Star" ranking. Virgil draws up a website to introduce the public to his new immigration law practice. The website prominently features that Virgil has a "Five Star" ranking from the "America's Best Lawyers" directory. Is it ethical for Virgil to include the ranking on his website?

Analysis:

Most jurisdictions allow lawyers to post rankings they have received from third parties, so long as the ranking can be verified and has not been purchased.[61] And, of course, the ranking cannot contain any material misrepresentation of law or fact. Here, the ranking can be verified, and Virgil did not pay for the ranking; it was given based on a review from a colleague. That review, so long as it was not sought in exchange for covering the colleague's case, is also permissible. In addition, to the extent the America's Best Lawyers site is a referral service, Virgil is permitted to pay the reasonable cost or usual charges to be on the site.[62]

The real problem is that the ranking constitutes a possible misrepresentation because it omits the facts that it is based on one review, and that the review is from a friend and colleague. Virgil could easily steer clear of this possible violation through the use of an appropriate disclaimer, stating, for example, "The Five Star Ranking does not guarantee results in any case, and is based only on reviews posted to the America's Best Lawyers website."

Hypothetical Twelve: Responding to Negative Reviews

Khalid represents a client in a citizenship application. The case is complicated, and although the application is ultimately successful, it takes far longer than the estimate that Khalid initially gave to the client. The client leaves a negative review on RateMyAttorney.com, correctly claiming that Khalid misinformed her about how long the case would take, but falsely claiming that Khalid never returned her phone calls and charged her more than promised. How can Khalid ethically respond to the client's comments?

Analysis:

Aside from ignoring the comments, which is almost certainly the best way to minimize the extent of the problem, Khalid has a number of options to consider, each with potential ethical problems. Among the options are posting a response; contacting the website and asking that the comments be removed; contacting the client and asking that she remove the comment; and seeking out other former clients to post positive comments as a way to mitigate the client's harmful statements.[63]

The first option—posting a response—requires language carefully crafted so as not to impermissibly reveal any confidential information about the case. The ABA recommends that nothing beyond language akin to the following be used in any response: "Professional obligations do not allow me to respond as I would wish."[64] Contacting the website also requires thoughtful consideration of how to ensure confidential information is not revealed. Some websites may be responsive to a request, but that request is made more difficult by the fact that confidential information cannot be used to dispute the claims. The lawyer can certainly make efforts to communicate with the client and ask them to correct any inaccuracies made in an online review. It may be that a conversation with the client can lead to a better understanding on both the part of the client and lawyer of the substance of the client's complaints.

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[61] *But see* N.J. SUP. CT. CTE. ON ADVERTISING, Notice to the Bar (May 2021) (creating strict guidelines for when lawyers can include awards and accolades in advertising materials), available at https://www.njcourts.gov/notices/2016/n160518a.pdf.

[62] MR 7.2(b)(2).

[63] There have also been some successful cases of lawyers suing client for defamation, but of course that requires a great deal of time and resources, often just brings more attention to the comments, and may not ultimately be successful.

[64] ABA FORMAL OP. 496 (2021).

The lawyer can also ask former clients who were happy with the representation to post a comment. The lawyer must be careful not to direct or imply that the happy former client should post false or misleading information regarding the lawyer's services, and must not compensate, give or promise anything of value for recommending the lawyer's services.[65]

D. State Variations of Model Rules 7.1, 7.2 & 7.3

State adaptations of Model Rules 7.1, 7.2, and 7.3, like adaptations of many of the business-related ethical rules,[66] vary widely and often carry highly specific guidance that is unique to that jurisdiction. Lawyers must always look at the rule adaptations in the jurisdictions that their communications are targeting when assessing how to act ethically with respect to communicating about their services. Practitioners should visit the separate charts of 7.1, 7.2, and 7.3 for a quick guide to every state's rule variations.

Laws change. In order to access the most current state's rules, we urge lawyers to access them online. We have compiled all state's ethics rules and resources at https://www.aila.org/practice/ethics/ethics-by-state.

[65] Under Model Rule 7.2 (b)(5) a lawyer can only provide "nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services."
[66] *E.g*. MR 1.5; 1.15.